TABLE OF CONTENTS

Table of Authorities

CASES

Constitutional Provisions, Regulations and Statutes and Guidelines

Miscellaneous

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-62

HUBERT WHEELER, et al.,
Petitioners,

vs.

ANNA BARRERA, et al.,
Respondents.

RESPONDENTS' BRIEF

JURISDICTION

Respondents contend that no substantial constitutional question has been preserved and presented to this Court.

STATUTES AND REGULATIONS INVOLVED

Title 20, U.S.C. Sec. 241a provides:

"In recognition of the special educational needs of children of low-income families and the impact that concentrations of low-income families have on the ability of local educational agencies to support adequate educational programs, the Congress hereby declares it to be the policy of the United States to pro-

vide financial assistance (as set forth in the following parts of this subchapter) to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means (including preschool programs) which contribute particularly to meeting the special educational needs of educationally deprived children."

Title 20, U.S.C. §241e provides in part:

"(a) A local educational agency may receive a grant under this subchapter for any fiscal year only upon application therefor approved by the appropriate State educational agency, upon its determination (consistent with such basic criteria as the Commissioner may establish)—

(1) that payments under this subchapter will be used for programs and projects (including the acquisition of equipment, payments to teachers of amounts in excess of regular salary schedules as a bonus for service in schools eligible for assistance under this section, and, where necessary, the construction of school facilities and plans made or to be made for such programs, projects, and facilities) (A) which are designed to meet the special educational needs of educationally deprived children in school attendance areas having high concentrations of children from low-income families and (B) which are of sufficient size, scope, and quality to give reasonable promise of substantial progress toward meeting those needs and to this end involve an expenditure of not less than $2,500, except that the State educational agency may with respect to any applicant reduce the $2,500 requirement if it deter-

mines that it would be impossible, for reasons such as distance or difficulty of travel, for the applicant to join effectively with other local educational agencies for the purpose of meeting the requirement; and nothing herein shall be deemed to preclude two or more local educational agencies from entering into agreements, at their option, for carrying out jointly operated programs and projects under this subchapter: *Provided,* That the amount used for plans for any fiscal year shall not exceed 1 per centum of the maximum amount determined for that agency for that year pursuant to section 241c of this title or $2,000, whichever is greater;

(2) that, to the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency has made provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate;

(3) that (A) the local educational agency has provided satisfactory assurance that the control of funds provided under this subchapter, and title to property derived therefrom, shall be in a public agency for the uses and purposes provided in this subchapter, and that a public agency will administer such funds and property, (B) Federal funds made available under this subchapter will be so used (i) as to supplement and, to the extent practical, increase the level of funds that would, in the absence of such Federal funds, be made available from non-Federal sources for the education of pu-

pils participating in programs and projects assisted under this subchapter, and (ii) in no case, as to supplant such funds from non-Federal sources, and (C) State and local funds will be used in the district of such agency to provide services in project areas which, taken as a whole, are at least comparable to services being provided in areas in such district which are not receiving funds under this subchapter: *Provided,* That any finding of noncompliance with this clause shall not affect the payment of funds to any local educational agency until the fiscal year beginning July 1, 1972, and *Provided further,* That each local educational agency receiving funds under this subchapter shall report on or before July 1, 1971, and on or before July 1 of each year thereafter with respect to its compliance with this clause; * * *"

Title 20, U.S.C. §241f provides in part:

"(a) Any State desiring to participate under this subchapter (except with respect to the program described in section 241e(c) of this title relating to migratory children of migratory agricultural workers) shall submit through its State educational agency to the Commissioner an application, in such detail as the Commissioner deems necessary, which provides satisfactory assurance—

(1) that, except as provided in section 241g(b) of this title, payments under this subchapter will be used only for programs and projects which have been approved by the State educational agency pursuant to section 241e(a) of this title and which meet the applicable requirements of that section and of section 241c(a)(5) of this title, and that such agency

will in all other respects comply with the provisions of this subchapter, including the enforcement of any obligations imposed upon a local educational agency under section 241e(a) of this title; * * *"

45 C.F.R., §116.19 provides in part:

"(a) Each local education agency shall provide special educational services designed to meet the special educational needs of educationally deprived children residing in its district who are enrolled in private schools. Such educationally deprived children shall be provided genuine opportunities to participate therein consistent with the number of such educationally deprived children and the nature and extent of their educational deprivation. The special educational services shall be provided through such arrangements as dual enrollment, educational radio and television, and mobile educational services and equipment. Such opportunities shall be made available to those educationally deprived children who reside in the public school attendance area designated as the project area or in a geographical area reasonably coterminous with the project area. If it is not practicable to apply a project to children enrolled in private schools because they are enrolled in a private school located in another school district, the applicant may make arrangements for such children with the local educational agency serving such other school district, including where appropriate the making of a joint project application.

(b) The needs of educationally deprived children enrolled in private schools, the number of such children who will participate in the program and the types of special educational services to be provided for them,

shall be determined, after consultation with persons knowledgeable of the needs of these private school children, on a basis comparable to that used in providing for the participation in the program by educationally deprived children enrolled in public schools.

(c) The opportunities for participation by educationally deprived children in private schools in the program of a local educational agency under Title I of the Act shall be provided through projects of the local educational agency which furnish special educational services that meet the special educational needs of such educationally deprived children rather than the needs of the student body at large or of children in a specified grade. The application for each project shall show the number of educationally deprived children enrolled in private schools who are expected to participate therein and the degree and manner of their expected participation.

(d) Any project to be carried out in public facilities and involving a joint participation of children enrolled in private schools and children enrolled in public schools shall include such provisions as are necessary to avoid classes which are separated by school enrollment or religious affiliation of the children.

(e) Public school personnel may be made available on other than public school facilities only to the extent necessary to provide special services (such as therapeutic, remedial, or welfare services, broadened health services, school breakfasts for poor children, and guidance and counseling services) for those educationally deprived children for whose needs such special services were designed and only when such services are not normally provided by the private

school. The application for a project including such special services shall provide assurance that the applicant will maintain administrative direction and control over those services. Subject to the provisions of §116.20, mobile or portable equipment may be used on private school premises for such period of time within the life of the current project for which the equipment is intended to be used as is necessary for the successful participation in that project by educationally deprived children enrolled in private schools. Provisions for special educational services for educationally deprived children enrolled in private schools shall not include the paying of salaries for teachers or other employees of private schools, except for services performed outside their regular hours of duty and under public supervision and control, nor shall they include the using of equipment other than mobile or portable equipment on private school premises or the constructing of private school facilities. * * *"

45 C.F.R., §116.20 provides:

"(a) Control over the use of funds provided under Title I of the Act, and title to and administrative control over property acquired with such funds, shall be in a public agency, which will exercise such control. Such funds and property shall be used for the purposes provided in Title I of the Act, but such a use shall not inure to the benefit of any private school. The incidental use of such property for other purposes is permitted only for related educational purposes on public premises and only so long as such a use does not interfere with the carrying out of a Title I project.

(b) Equipment acquired with funds provided under Title I of the Act may, in certain cases, be placed

on private school premises for a limited period of time, but the title to and administrative control over such equipment must be retained and exercised by a public agency. In exercising that administrative control, the public agency shall not only keep records of, and account for the equipment but shall also assure itself that the equipment is being used solely for the purposes of the project, and remove the equipment from the private school premises when necessary to avoid its being used for other purposes or when it is no longer needed for the purposes of the project.

(c) The application by a local educational agency must contain a satisfactory assurance that the funds provided under Title I of the Act, and property derived therefrom, will at all times be under the control of, and be administered by, a public agency in accordance with the provisions of the Act and the regulations in this part."

QUESTIONS PRESENTED

Petitioners' Brief does not adequately and fairly state the questions at issue in this case. Respondents state the questions presented as follows:

1. Did the Court of Appeals err in finding that the Petitioners, Missouri State Board of Education and Commissioners of Education, failed to perform their duties under Title I ESEA by misadministrating the program so as to deny educationally deprived children who attend private schools the equitable and comparable benefits under the Act?

2. Did the Court of Appeals err in finding that the Petitioners, State Board of Education and Commissioners

of Education, may not deny educationally deprived children who attend private schools benefits under Title I ESEA by relying upon their interpretations of state law or assertions of discretion?

3. Did the Court of Appeals properly order the Petitioners to administrate Title I programs so as to provide educationally deprived children who attend private schools equitable and comparable benefits under the Act including permitting the services of Title I personnel at private school premises during regular school hours where such services are available to educationally deprived children with similar needs who attend public schools?

4. Do the Petitioners have standing to attack the constitutionality of Title I ESEA? If they have such standing, have Petitioners timely raised and properly preserved the constitutional questions? Further should this court pass upon important constitutional issues on a speculative or hypothetical basis?

5. In the event that this Court determines that a constitutional question is properly before it, is the providing of Title I services to educationally deprived children who are enrolled in private schools by making public school personnel available on private school premises in violation of requirements of the Establishment Clause?

STATEMENT OF THE CASE

Respondents do not accept Petitioner's statement of the case.

THE PARTIES: Respondent children (Plaintiffs below) are educationally deprived children living in areas of concentrated poverty within the meaning of Title I

ESEA. (A. 11 and 12; R. Vol. p. 57.) Their parents are also parties. (A. 11 and 12.) They attend nonpublic schools in the inner city of Kansas City, Missouri. Some of the Respondent children attend St. Joseph's School, the others attend Our Lady of the Americas Upper and Lower schools. St. Joseph's has a predominantly Negro enrollment, and Our Lady of Americas' enrollment is 98% Mexican-American. (R. Vol. III, p. 92.) Each of these schools have a very high concentration of educationally deprived children. Out of a total enrollment of 178 children at Our Lady of Americas Upper, 171 are educationally deprived. Of 139 children enrolled in Our Lady of Americas Lower, 133 are educationally deprived. Of the 252 students enrolled at St. Joseph's, 106 are educationally deprived. (R. Vol. IV, Plaintiffs' Exhibit No. 7, p. 2, introduced in evidence R. Vol. III, p. 64.) In addition to being educationally handicapped, 119 children at St. Joseph's are culturally isolated. (R. Vol. V, Plaintiffs' Exhibit No. 8, unnumbered p. 144, offered in evidence R. Vol. III, p. 144.) The children at Our Lady of Americas also suffer from linguistic and cultural isolation. (R. Vol. III, p. 93.) They are representatives of a class of all educationally deprived nonpublic school children in the State of Missouri who are eligible beneficiaries of Title I ESEA. (R. Vol. I, p. 24.)

Petitioners (Defendants below) are the members of the Missouri State Board of Education and the present and past Missouri Commissioner of Education. (A. 11, 29, and 30.) Petitioners have the duty of approving all applications for Title I grants pursuant to the Act and criteria established by the United States Commissioner of Education, and also to enforce federal requirements on local public educational agencies. 20 U.S.C., Sec. 241f; 45 C.F.R., Sec. 116.34. (R. Vol. III, pp. 16, 22.)

THE PROCEEDINGS: Respondents commenced this civil action by a complaint filed April 6, 1970, in the United States District Court for the Western District of Missouri, charging that Petitioners (Defendants) had intentionally and consistently denied them rights guaranteed under the Constitution and laws of the United States. (A. 1, 9.)

On August 31, 1970, the District Court dismissed the complaint on the basis of federal abstention and further that the plaintiffs had failed to exhaust administrative remedies. (A. 3; R. Vol. I, p. 30.) On appeal, the United States Court of Appeals for the Eighth Circuit on April 28, 1971, reversed on both grounds and remanded the case for trial. *Barrera* v. *Wheeler*, 8th Cir., 441 F. 2d 795.

On January 18, 1972, the District Court entered a pre-trial order separating and limiting the issues of trial (R. Vol. I, p. 49) and on February 22, 1972, the trial was held on the issues as limited by the District Court. (A. 6.) On June 2, 1972, the District Court filed its Memorandum and Opinion finding *inter alia* that there had been "undoubtedly inequitable expenditure of Title I funds between educationally deprived children in public and nonpublic school" but that "private school pupils could undoubtedly receive an equitable proportion of the funds through after-hour and summer school instruction programs." (Petition for Certiorari, p. A41 or R. Vol. I, pp. 59 and 60.) The District Court denied plaintiffs relief. The District Court's Opinion is unreported. (The full text of the District Court's Opinion is found in the R. Vol. I, pp. 58-63, and is also reprinted at page A39 et seq. of the Petition for Writ of Certiorari.)

On March 16, 1973, the United States Court of Appeals for the Eighth Circuit found that petitioners had flagrantly violated the provisions of Title I ESEA and reversed and

remanded the case to the District Court with directions to enter an injunction on behalf of respondents. *Barrera et al.* v. *Wheeler et al.*, 8th Cir., 475 F. 2d 1338. Petitioners have asked this Court to review that decision of the Court of Appeals.

THE TITLE I PROGRAM: Since this is one of the first cases involving the Elementary and Secondary Education Act of 1965, Title I, 20 U.S.C., Sec. 241a et seq. presented to this Court, a summary of the law may be helpful. For sake of brevity the Act shall at times herein be referred to as "Title I".

The Elementary and Secondary Education Act of 1965 (ESEA) was enacted as Public Law 89-10 with the following declaration of purposes:

> "In recognition of the special educational needs of children of low-income families and the impact that concentrations of low-income families have on the ability of low educational agencies to support adequate educational programs, the Congress hereby declares it to be the policy of the United States to provide financial assistance (as set forth in the following parts of this subchapter) to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means (including preschool programs) which contribute particularly to meeting the special educational needs of educationally deprived children." 20 U.S.C., Section 241a.

The term "local educational agency" (LEA) normally means a public school district. 20 U.S.C., Sec. 244(6); 45 C.F.R., Sec. 116.1(r). In Missouri, the state educational agency (SEA) is the Petitioner, State Board of Education. 20 U.S.C., Sec. 244(7); 45 C.F.R., Sec. 116.1(aa).

"Educationally deprived children" are:

> ". . . those children who have need for special educational assistance in order that their level of educational attainment may be raised to that appropriate for children of their age. The term includes children who are handicapped or whose needs for such special educational assistance result from poverty, neglect, delinquency, or cultural or linguistic isolation from the community at large." 45 C.F.R., Sec. 116.1(i).

Title I is not a general-aid-to-education type program but rather provides special services to a particular group, i.e. the educationally deprived children in low-income areas without regard to where or whether they attend school. 20 U.S.C., Secs. 241a and 241e(a)(1) & (2).

Not every public school district, not every public school attendance area, not every child, not every educationally deprived child, is eligible for Title I benefits. Based on the highest concentration of low-income families, certain school attendance areas are identified as a project area. Children residing outside of this project area may not participate in Title I programs. 45 C.F.R., Sec. 116.17(d). Children within the project area are tested for educational deprivation. From this it is determined what is the highest priority need; the greatest needs must be served first. For example, if most of the children are deficient in reading and only a few are deficient in mathematics, then remedial reading programs must be offered and children who are educationally deprived in mathematics do not participate. 45 C.F.R., Sec. 116.17(f). Finally, a project is tailored to meet the special educational needs of this group of children that have the greatest need. 45 C.F.R., Sec. 116.17(g). Even special programs cannot be provided to

educationally deprived children attending private schools if a private school normally provides the service. 45 C.F.R., Sec. 116.19(e).

Programs under the Act are fully financed by Federal funds appropriated by the United States Congress. No matching local funds are required from either state or local agencies. 20 U.S.C., Sec. 241g. Each state is eligible to receive Federal funds in an amount based upon a formula which principally considers the number of school age children from low-income families. 20 U.S.C., Sec. 241c. The maximum eligibility for Federal funds is further broken down to county and public school district units. 45 C.F.R., Sec. 116.2 et seq.

In order for a state to participate, its State Educational Agency (Petitioners here) must submit to the United States Commissioner of Education an application assuring: (1) that federal funds will be used only for programs approved pursuant to Federal law and criteria and the SEA will comply with all such provisions and enforce such obligations as are imposed on local educational agencies; (2) that fiscal control and fund accounting procedures necessary to assure proper distribution of Federal funds will be adopted; and that (3) required reports and records will be maintained and provided to the United States Commissioner of Education. 20 U.S.C., Sec. 241f.

Under Title I local educational agencies desiring to receive Federal funds must submit an application to the SEA for approval. The SEA is required to disapprove the application unless it meets the criteria established under the Act and by the regulations and directives of the United States Commissioner of Education. 20 U.S.C., Sec. 241e.

Among the determinations required to be made by the SEA prior to approval of an application is the following:

"(a) A local educational agency may receive a grant under this subchapter for any fiscal year only upon application therefor approved by the appropriate State educational agency, upon its determination (consistent with such criteria as the Commissioner may establish.)

* * *

"(2) that, to the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency has made provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate;" 20 U.S.C., Sec. 241e(a)(2).

The United States Commissioner of Education has established by regulation and directives further criteria which must be met by local educational agencies prior to receiving federal funds. Some of the criteria applicable to participation of children enrolled in nonpublic or private schools are as follows: (1) Educationally deprived children of such schools must be provided genuine opportunities to participate in special educational services consistent with their number and the nature and extent of their educational deprivation. 45 C.F.R., Sec. 116.19(a). (2) Services must be determined and be provided on a basis comparable to that used in providing for participation by educationally deprived children enrolled in public schools. 45 C.F.R., Sec. 116.19(b). There shall be an "equitable sharing" of Title I resources by both groups. USOE Program Guide No. 44, Sec. 4.5 (Reprinted USOE Handbook, p. 41). (3) Personnel employed under Title I who provide "mobile educational services" may be made

available on other than public school facilities (including nonpublic school premises) to provide special services which are not normally provided by the nonpublic school. 20 U.S.C., Sec. 241e(a)(2); 45 C.F.R., Sec. 116.19(e).

Federal funds made available to state and local educational agencies may be used only for expenditures necessary to carrying out approved projects. 20 U.S.C., Sec. 241e(a)(1); 45 C.F.R., Sec. 116.53. Control of all funds and properties must remain in public agencies. 20 U.S.C., Sec. 241e(a)(3). No Title I funds may be used for religious worship or instruction. 45 C.F.R., Sec. 116.53(e). Nor may federal funds or property "inure to the benefit of any private school." 45 C.F.R., Sec. 116.20(a).

STATEMENT OF FACTS

In 1965, the United States Congress passed the Elementary and Secondary Education Act, Title I, with the declared purpose being to break the "cycle of poverty" by assisting local educational agencies to provide for the "special educational needs of educationally deprived children" who live in areas with a concentration of poverty. 20 U.S.C., Sec. 241a.

The Act expressly provides that educationally deprived children will be helped, whether they attend a public school, a private school, or no school at all. 20 U.S.C., Sec. 241e(a)(2). The rights of educationally deprived children attending private schools to receive services under the Act are expressed by the United States Commissioner of Education in these words:

> "The needs of private school children in the eligible areas may require different services and activities. These services and activities, however, must be com-

parable in quality, scope, and opportunity for participation to those provided for public school children with needs of equally high priority. 'Comparability' of services should be attained in terms of the number of educationally deprived children in the project area in both public and private schools and related to their specific needs, which in turn should produce an equitable sharing of Title I resources by both groups of children." USOE Program Guide No. 44, Sec. 4.5 (reprinted USOE Handbook, pp. 41 and 42.) Also see: 45 C.F.R., Sec. 116.19.

Title I activities are carried out by local educational agencies, usually public school districts under applications which are approved by state educational agencies (the Petitioners here) pursuant to the federal law and criteria. 20 U.S.C., Sec. 241e. In order for Missouri to participate in this federal program, the Petitioners submitted assurances to the United States Commissioner of Education that they would use the federal funds only for projects which had been approved in compliance with the federal law and criteria, including the requirement that educationally deprived children attending nonpublic schools were to participate. 20 U.S.C., Sec. 241f.

Before the Act was even operational in Missouri, Petitioners, in October of 1965, adopted administrative prohibitions which limited the participation of educationally deprived children attending nonpublic schools to basically equipment loans and activities outside of regular school hours. (R. Vol. III, pp. 26 and 27.)

In defense of their actions, Petitioners assert that limiting the participation of educationally deprived children attending private schools is a matter within their discretion, and further, is based upon their interpretation of

state laws. Respondents contend and the Court of Appeals found that neither claims of discretion or interpretations of state law permit Petitioners to violate the requirement of the federal Act and criteria. The Court of Appeals said:

> "The *only* control the state board has over such funds (Title I funds) is to channel them to the local agencies and to review the programs of the local educational agencies to make certain that the programs are consistent with the Act and the Commissioner's regulations." (Parens. added.) *Barrera et al.* v. *Wheeler et al.*, 8th Cir., 475 F. 2d 1338, at 1352.

The Attorney General of Missouri, in an official opinion, ruled that Missouri law did not impose limitations on the expenditure of federal funds and that Title I personnel may provide services to educationally deprived children attending private schools by offering those services on private school premises. *Barrera, supra,* at 1350, footnote 20. Petitioners refuse to follow the State Attorney General's Opinion. (Petitioners are not represented in this case by the Attorney General because of their refusal to follow his legal advice.)

The uncontroverted evidence in this case is that Petitioners' actions resulted in gross inequities to educationally deprived children attending private schools. Measured by any standard—proportionate expenditure of funds, services offered, the quality and scope of services, educational effectiveness—by all measurements educationally deprived children attending private schools were treated inequitably. Even the District Court found that there had been, "undoubtedly inequitable expenditure of Title I funds between educationally deprived children in public and nonpublic schools." (Petition for Writ of Certiorari, p. A41.)

The Court of Appeals found that Petitioners had "flagrantly" violated the requirements of Title I. It is noteworthy that Petitioners still do not challenge the evidence nor the findings of the Court of Appeals on this issue.

A representative sample of actual Title I ESEA applications were introduced in evidence. The sample included two metropolitan, a suburban, and a rural school district. Although ESEA does not require an exact per capita expenditure for each and every child eligible for benefits, per capita expenditure is a significant means of measuring whether or not the program provides an equitable service. The following table compares per capita expenditures in these four representative school districts:

School District	Expenditure per public school child	Expenditure per private school child
Berkley	$210	$85
Linn	$244	$30
Kansas City	$250	$25
St. Louis	$242	$10

Ed Downey, in charge of Title I for the Kansas City Public School District, also testified as to the gross disparity in per pupil expenditures in that District. (R. Vol. III, p. 69.)

An examination of these applications also shows that the activities available to educationally deprived children in public schools were extensive and varied, while opportunities for educationally deprived children attending private schools were mere tokens.

In no case and at no time were deprived children attending private schools allowed the benefit of Title I per-

sonnel services during regular school hours. (R. Vol. III, p. 18). It should be noted that there are only two basic ways of providing personnel services to deprived children attending private schools. They are dual enrollment and mobile educational services. 20 U.S.C., Sec. 241e(a)(2). USOE Handbook, p. 11. The actions of the Petitioners have prohibited educationally deprived children from participating in Title I services by either method. Since over 70% of Title I funds are spent on personnel (R. Vol. I, pp. 55 and 56) in effect, Petitioners have effectively eliminated deprived children in private schools from participation in over 70% of Title I opportunities.

Petitioners are the only state educational agency in the nation that have prohibited educationally deprived chldren enrolled in private schools from receiving the benefits of Title I services by either going to a public school through dual enrollment or having the Title I teacher come to the private school premises in the form of mobile educational services. (R. Vol. IV, Plaintiffs' Exhibit No. 2, offered in evidence R. Vol. III, p. 19. Also see: Survey conducted by the United States Office of Education, reprinted as Appendix to this Brief.)

Petitioners promulgated a policy which, on its face, would have required equitable expenditure of Title I funds for both public and private school children. The state policy, known as Policy No. 2, stated in part as follows:

> "12. The average cost per pupil enrolled in a private school and participating in a Title I, ESEA, program and the average cost per pupil enrolled in a public school and participating in a Title I, ESEA, program will be used as a guide in making State Department of Education approval. If the variance is greater than 10 per cent (more or less) justification will be re-

quested before making approval." (R. Vol. IV, Plaintiffs' Exhibit No. 6, offered in evidence R. Vol. III, p. 28.)

However, the Petitioners Title I Director testified that in comparing per pupil expenditures they only considered the expenditures for equipment and totally excluded expenditures for personnel. For example, if a Title I application provided for expending $200 per public school child for personnel services plus $50 per child for equipment but provided no personnel and $50 per child for equipment for nonpublic school children, then the State Title I Director would aprove the application. (R. Vol. III, McCullough's Deposition, pp. 65, 66, 95, and 96.)

The Court of Appeals found that Petitioners' practices "flagrantly breaches the State Commissioner's own statement of policy." *Barrera, supra,* at 1345, footnote 8.

In October of 1972, the United States Commissioner of Education, Sidney Marland, notified the State Commissioner of Education that certain Title I programs in Missouri did not comply with the regulations regarding participation of private school children. (R. Vol. IV, Plaintiffs' Exhibit No. 2, offered in evidence R. Vol. III, p. 19; also, R. Vol. III, pp. 168 and 169.) Petitioners adamantly refused to change their policies and practices regarding the participation of deprived children attending private schools. Note the negative tenor of Petitioners' response to Commissioner Marland's letter. (R. Vol. VII, Defendants' Exhibit No. 6, offered in evidence R. Vol. III, p. 116.) Following Commissioner Marland's complaint, the Kansas City application was amended to provide additional equipment to deprived private school children, but no personnel services. (R. Vol. VI, Defendants' Exhibit No. 1, offered in evidence R. Vol. III, p. 48.)

The Court of Appeals found (and Respondents agree) that Title I does not require a certain expenditure per pupil. Title I services are to be based solely on the assessed need of the child. *Barrera, supra*, at 1347. The uncontroverted evidence is that even if an equal amount was expended per pupil limiting deprived private school children to equipment loans and after-hour services would not be comparable to the services of personnel during regular school hours. The Court of Appeals found:

> "It is not a comparable program where the need for remedial services of the educationally deprived private school pupil is at least equal to that of the educationally deprived public school student and the only service provided to the private school child is the furnishing of equipment. It is not a comparable program to provide only after-hour and summer remedial instruction on neutral sites which are open to the needy private school child while offering the same services during regular school hours for deprived public school pupils, ..." *Barrera, supra*, at 1348.

All of the educators who testified, including State Commissioner of Education Wheeler, testified as to the disadvantages of programs conducted outside of regular school hours.

> "Thinking of my own sixteen year old daughter, I would a lot rather they would get it in the nine months' time than to have to go in the summer time, too. Everyone would feel the same way, I think. They are entitled to go during the day and get it. If they could get it during the week, it would be best." (R. Vol. II, Wheeler Deposition, pp. 87, 88.)

Ed Downey, Title I Director of the Kansas City Public School District testified:

"It is most difficult for special services to be provided without personnel as is evidenced by nonpublic school or, pardon me, public schools making use of such personnel to carry out an effective program." (R. Vol. III, p. 43.)

After extensive cross-examination, Mr. Downey reiterated, "In my judgment the provision of personnel would be advantageous." (R. Vol. III, p. 59.) When asked if an after-hour program could be made comparable by spending an equal amount of money as spent on public school programs during their regular hours, he stated, "It would be comparable in dollars amount spent, in my judgment, it would not be comparable as far as . . . educationally most appropriate." (R. Vol. III, p. 80.)

Since Petitioners, who had the power to approve or disapprove Title I applications in Missouri, uniformly disapproved the use of Title I personnel on private school premises, there is no evidence in the record as to how such a service would be actually implemented. The Court of Appeals, noting the variety of possible Title I programs, declined to give an advisory opinion on the constitutionality of hypothetical programs which were not before it. *Barrera, supra,* at pp. 1353, 1354.

Corrections of Petitioners' Statement: Petitioners have made a number of erroneous or inaccurate statements in their brief. We shall merely enumerate them at this point, and treat them more at length in relevant parts of our argument. The false statements reflect a basic lack of knowledge of Title I ESEA and a lack of understanding of the facts in this case. The inaccurate statements, we assume, are an overzealous effort to set forth their case.

Petitoners state that providing Title I ESEA services on private school premises is contrary to Missouri state law. The Attorney General of Missouri has ruled that state law permits Title I personnel to provide services on private school premises and that Missouri law does not restrict the expenditure of federal funds. *Barrera, supra,* at 1350, footnote 20. The Court of Appeals held that the state cannot pass a law or interpret its own laws to say that a Title I grant is to be considered state funds. *Barrera, supra,* at 1352. More accurately, Petitioners should state that they *assert* that state law limits the use of Title I funds. No legal authority concurs in their assertion.

Petitioners state that Title I services are "basically everyday regular instruction." (Petitioners' Brief, p. 26.) This statement is untrue. Title I services are limited to those designed to meet the special educational needs of educationally deprived children in school attendance areas having a high concentration of low-income families. 20 U.S.C., Sec. 241e(a)(1). In particular, Title I cannot provide any service already offered by a private school. 45 C.F.R., Sec. 116.19(e).

Next, Petitioners state that it is permissible to employ regular nonpublic school teachers under Title I. This statement is untrue. Title I does not permit payment of a salary of a private school teacher. 45 C.F.R., Sec. 116.19(e). Also see: Senate Report No. 146; 1965 U.S. Cong. Admin. News 1456.

Petitioners state that Title I does not include welfare benefits such as medical or dental care, breakfasts, and lunches, or even psychological services for maladjusted children. (Petitioners' Brief, p. 13.) They also indicate that the mentally retarded and emotionally disturbed children are not eligible. These statements are untrue.

45 C.F.R., Sec. 116.1(i) and (o). Also note: Senate Report No. 146; 1965 U.S. Cong. and Admin. News, 1455 and 1456, and the Testimony of Petitioners own Title I Coordinator. (R. Vol. III, p. 162.)

Petitioners also state that Title I teacher aides may assist regular nonpublic school teachers. (Petitioners' Brief, p. 36.) This statement is untrue. See: USOE Program Guide No. 24, Sec. 10. (Reprinted USOE Handbook, p. 36.)

SUMMARY OF ARGUMENTS

1. Title I ESEA clearly provides for meeting the special educational needs of *all* educationally deprived children living in low-income areas, including children in public schools, nonpublic schools, or out of school. Educationally deprived children are to be provided genuine opportunities to receive equitable benefits based on their need. Measured by any standard, Missouri educational officials have misadministered Title I so as to deny educationally deprived children attending private schools the comparable benefits intended by Congress. Measured by expenditures, program offerings, or educational effect, Title I services to deprived children attending private schools in Missouri demonstrate a state policy of tokenism and obstinate non-compliance with federal requirements.

Over 70% of Title I funds are spent for personnel. Every educator who testified in the case was of the opinion that comparable services cannot be provided in the absence of personnel. There are only two basic ways for providing the services of public Title I employees to deprived children attending private schools. They are dual enrollment and mobile educational services, i.e., sending public employees to serve deprived children at private school

premises. Dual enrollment is regarded as contrary to state law in Missouri. Missouri state laws do no prohibit or limit mobile educational services provided under Title I. (If Missouri law also prohibited mobile educational services, Missouri would be unable to participate in Title I.) Petitioners' denial of all personnel services to educationally deprived children attending private schools denies these children the benefits intended by Congress and violates the requirements of the Act.

Therefore, the Court of Appeals properly held that Respondent children were entitled to comparable Title I benefits and that under the unique situation existing in Missouri, public school employees, under Title I, must provide special services on private school premises consistent with the needs of the children if such services are provided to deprived children attending public schools.

2. The historical causes of Title I were the national problems manifest in the strong correlation between educational underachievement and poverty, as evidenced by draft rejection rates, unemployment, and the dropout problem. To meet this problem, Congress passed Title I to assist all educationally deprived children in poor areas throughout the nation.

Title I funds are only granted to *public* agencies. No private institution, its employees, or patrons can receive Title I funds. The services provided by public educational agencies are directed to the special needs of educationally deprived children. The services are not part of the regular curriculum of the private school, and do not supplant any service provided by a private school.

Unlike the unrestricted grants in *Nyquist*, *Sloan*, and *Levitt*, there is a clear separation under Title I between the secular services provided by public employees and the

religious functions of some private schools. Control of funds, title to property and the administration of the program are expressly limited to public agencies.

Unlike *Lemon, DiCenso*, and *Sanders*, where public funds were paid to sectarian institutions and their employees, no "excessive entanglement" is required under Title I to assure that secular limitations are complied with. Since no public funds go to private institutions, there is no occasion for examination of records or for auditing private institutions. Since all Title I personnel are the employees of public educational agencies and under their supervision and control, no occasion exists for the surveillance of private school employees. The Establishment Clause does not prohibit public institutions from supervising its own employees.

Like the public services provided in *Allen* and *Everson*, Title I provides services "in common to all students." No special beneficiary class is created along religious lines. Treating all children alike based on their educational needs is the antithesis of political divisiveness.

Title I establishes a program to help all deprived children, administered by public agencies, using public funds and employees, under public supervision and control. It provides secular services not otherwise available to deprived children attending private schools as part of a general program of helping all educationally deprived children. Thus, Title I does not violate the Establishment Clause.

3. The constitutionality of Title I was not raised by the Petitioners in the trial court. Neither the District Court nor the Court of Appeals passed upon the constitutional issue. Furthermore, since Petitioners' actions absolutely prohibited mobile educational services to educationally deprived children attending private schools, there

is no evidence before this Court as to how such programs would be actually implemented. Respondents assert that this Court should not exercise jurisdiction over constitutional issues which have not been properly preserved and presented to this Court; and further because any decision as to the constitutional implementation of Title I services would have to be based upon speculation and hypothesis.

ARGUMENT

I

In the unique situation existing in Missouri, if educationally deprived children who attend private schools in Missouri are to receive benefits under Title I ESEA comparable in quality, scope, and opportunity for participation to those provided for deprived public school children, then publicly employed teachers must, in most projects, render Title I services at private school premises during regular school hours.

The educationally deprived children enrolled in private schools are entitled to the benefits of Title I ESEA under the clear mandate of the Statute. They are not to be given instructional leftovers or academic handouts, but they must be considered the direct beneficiaries of the Statute. The State Board of Education, from the time of the earliest implementation of Title I to the filing of the Brief herein, persists in treating these children as unwelcome and unnecessary encumbrances in the planning and operation of Title I ESEA.

The Congress has provided in Title I ESEA as follows:

"A local educational agency may receive a grant under this subchapter for any fiscal year only upon application therefor approved by the appropriate State educational agency, upon its determination (consistent with such basic criteria as the Commissioner may establish)

* * *

"(2) that, to the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled

in private elementary and secondary schools, such agency has made provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate;"

The Court of Appeals found that it was the undisputed purpose of Title I to benefit educationally deprived children whether attending a public or a nonpublic school, and that the opportunities offered to deprived private school children by the Petitioners of mere equipment loans and after-hour programs were not comparable. Therefore, the Court concluded:

> "Thus we find that when the need of educationally disadvantaged children requires it, Title I authorizes special teaching services, as contemplated within the Act and regulations, to be furnished by the public agency on private as well as public school premises. In other words, we think it clear that the Act demands that if such special services are furnished public school children, then comparable programs, if needed, must be provided the disadvantaged private school child." *Barrera, supra*, at 1353.

The basic mandate of the Court of Appeals is that both private and public educationally deprived children equitably share Title I benefits. This could have been accomplished by requiring that all Title I services to both public and private school educationally deprived children be offered after regular school hours or during the summer. Since such programs are generally educationally poor, such a solution would have resulted more in mediocrity rather than in equity. For deprived children to receive the benefit of Title I personnel during regular school hours, other options must be used. Title I services could be pro-

vided at a service center outside of both regular public school and private school premises with all needy children going to the center. Note for example the instructional service center provided for teachers in the Kansas City application. (R. Vol. IV, Plaintiffs' Exhibit No. 7, offered in evidence R. Vol. III, p. 64.) Another option would be providing Title I services through self-contained mobile labs or teaching units which would travel to both public and private schools to serve educationally deprived children. USOE Handbook, p. 11. Dual enrollment is another option authorized by federal law. Classrooms could be leased from private schools as was done with approval in *Nebraska State Board of Education* v. *School District of Hartington*, 409 U.S. 921.

The Petitioners delight in asserting that the Act does not require that public school teachers be sent to private school premises to render educational services. But such an artless pronouncement offers no solution to the issue, and cannot absolve the State Board from the results of its scheme to continue to emasculate the provisions of the Statute. The problem is that the State Board also announces that it will not approve of any plan of dual enrollment under Title I. The difficulty continues to exist.

The Court of Appeals discerned that the draconian pronouncements of the State Board demonstrated a deliberate plan to violate the directions of the Statute and to continue to deny the benefits of Title I ESEA to the educationally deprived children in private schools.

We are compelled to point out that the State Board of Education, its members and Commissioner in their lengthy briefs and pleadings in this cause, have yet to suggest any alternative to the use of public school, Title I personnel serving children at private school premises, for special Title I courses.

For eight years the State Board of Education had been content with the stubborn negativism toward educationally deprived children attending private schools. Petitioners have refused to follow the clear directions of the statutes. They have failed to comply with the assurances given to the United States pursuant to the Act. They have refused to follow the official opinions of the chief legal officer of the state of Missouri, and were intransigent in the face of investigations and recommendations of the United States Commissioner of Education. Note particularly Petitioners' response to Commissioner Marland, R. Vol. VII, Defendants' Exhibit No. 6, offered in evidence R. Vol. III, p. 116.) Even at a conference with the District Court held after the issuance of the Court of Appeals' opinion, the Petitioners adamantly refused to take any corrective action until the injunction was actually issued.

Faced with this history of obstinancy of Petitioners, the District Court, retaining continuing jurisdiction, issued an injunction designed to practically implement the opinion of the Court of Appeals.

The Courts of the United States have far reaching powers to effectuate their decrees and judgments. This Court recently stated:

> "We see therefore that the use made of mathematical ratios was no more than a starting point in the process of shaping a remedy, rather than an inflexible requirement. *From that starting point the District Court proceeded to frame a decree that was within its discretionary powers, as an equitable remedy for the circumstances. As we said in Green, a school authority's remedial plan or a district court's remedial decree is to be judged by its effectiveness.*"
>
> ". . . The remedy for such segregation may be administratively awkward, inconvenient, and even bi-

zarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems. . . . When school authorities present a district court with a 'loaded game board,' affirmative action in the form of remedial altering of attendance zones is proper to achieve truly non-discriminatory assignments. In short, an assignment plan is not acceptable simply because it appears to be neutral.

"In this area, we must of necessity rely to a large extent, as this Court has for more than 16 years, on the informed judgment of the district courts in the first instance and on courts of appeals." (Emphasis added.) *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 at 25 and 28.

The injunction was designed to meet the practical problems in Missouri where comprehensive Title I programs during regular school hours are provided to educationally deprived children attending public schools while deprived children attending private schools were excluded from such programs by the obstinate actions of Petitioners and only provided equipment loans or partial after-hour services.

(1) Title I requires that educationally deprived children be served equitably and comparably, based on their needs.

Title I provides a comprehensive package of services to the educationally deprived child. It may include anything from special remedial instruction to services for the mentally retarded to a hot breakfast. But, the program must be "designed to meet the special educational needs of educationally deprived children in school attendance

areas having a high concentration of children from low-income families." 20 U.S.C., Sec. 241e(a)(1). Congress expressly provided that the educationally deprived child should receive the benefits whether attending a public or a nonpublic school. 20 U.S.C., Sec. 241e(a)(2).

In the criteria established pursuant to 20 U.S.C., Sec. 241e(a) the United States Commissioner of Education has provided that educationally deprived children attending nonpublic schools shall be provided "genuine opportunities to participate" in Title I programs "consistent with their number" and the "extent of their educational deprivation." The Commissioner has further required that the needs of educationally deprived children enrolled in nonpublic schools and the services provided them be determined "on a basis comparable to that used in providing for the participation" of educationally deprived children enrolled in public schools and that LEA applications shall show the "number," "degree and manner" of participation of such children. 45 C.F.R., Sec. 116.19(a), (b), and (c). The Commissioner has summed these requirements up in Sec. 4.5 of Program Guide No. 44 in these words:

> "The needs of private school children in the eligible areas may require different services and activities. Those services and activities, however, *must be comparable in quality, scope, and opportunity for participation* to those provided for public school children with needs of equally high priority. 'Comparability' of services should be attained in terms of the numbers of educationally deprived children in the project area in both public and private schools and related to their specific needs, which in turn should produce *an equitable sharing* of Title I resources by both groups of children." USOE Handbook, pp. 41 and 42. (Emphasis added.)

From the very inception of the legislation in question, there was an obvious official intention of providing comparable services for all educationally deprived children. President Johnson in his Message to Congress on Education on January 12, 1965, stated:

> "Federal action is needed to assist the States and localities in bringing the full benefits of education to children of low income families. Assistance will be provided; for the benefit of all children within areas served, including those who participate in shared services or other special educational projects". 1965 Congressional Quarterly Almanac at 1374.

The clear intent is to help the educationally deprived child wherever he may be found. Whether the child attends a public school, a private school, or no school at all is merely a circumstance that must be considered in delivering the services to the child. To reach a dropout the program may have to go into pool halls because that is where these children are. To reach the delinquent, the program may go into correctional institutions because that is where these children are. To reach the handicapped, the program may have to go into the home or a health facility because that is where these children are. To reach an elementary or secondary school pupil the program usually will go into the schools, public and private, because that is where these children are. The goal is to reach *all* eligible children and serve their needs.

(2) Petitioners have inequitably administered Title I.

Petitioners have filed written assurances with the U.S. Commissioner that they will only approve Title I programs that meet the requirements of Section 241e(a) and will enforce these obligations upon LEA's. These assurances

are required by 20 U.S.C., Sec. 241f. However, the actions of Petitioners have to the contrary assured that the participation of educationally deprived children enrolled in nonpublic schools in Missouri will be peripheral at best.

The largest proportion of Title I funds are expended for personnel services. During the 1971 fiscal year in Missouri, 77.6% of Title I funds were spent for personnel services (including administrative services, health services, attendance services, transportation, and maintenance). Of this, 67.43% was for instructional personnel alone. (R. Vol. I, pp. 55 and 56.)

There are only two methods by which Title I personnel can serve educationally deprived children attending nonpublic schools during regular school hours. They are dual enrollment and mobile educational services. 20 U.S.C., Sec. 241e(a)(2). In dual enrollment, the pupil goes to the instructor for special services. A nonpublic school child would, on a part-time basis, attend a public school to receive Title I services. In mobile educational services, services come to the child. Either the Title I teacher comes onto nonpublic school premises or a self-contained mobile teaching unit with equipment and personnel goes on or adjacent to the nonpublic school premises. USOE Handbook, p. 11.

Prior to the implementation of Title I in October of 1965, the Petitioners, State Board of Education, adopted a regulation prohibiting both methods of providing services to educationally deprived children attending nonpublic schools.

State Regulation No. 1(d) provided:

"Title I, PL89-10 programs and projects operated by public school districts must be in conformity with the Missouri State laws. Section 167.031, RSMo., Supp. 1963 states:

'Every parent, guardian or other person in this State having charge, control or custody of a child between the ages of 7 and 16 years shall cause the child to attend regularly some day school, public, private, parochial, parish, not less than the entire school term of the school which the child attends. . . .' *Therefore, shared time or dual enrollment between public and non-public schools would not be in conformity with State law.* Programs operated in the public school for all children after regular school hours, on Saturday and during the summer, after the close of the regular school term, would be in conformity with the law." (R. Vol. III, p. 26.) (Emphasis added.)[1]

State Regulation No. 4(d) provided as follows:

"Special educational services and arrangements, including broadened instructional offers made to children in private school, shall be provided at public facilities. *Public school personnel shall not be made available on private facilities.* This does not prevent the inclusion in a project of special educational arrangements to provide educational radio and television to students in private schools." (R. Vol. III, pp. 26 and 27.) (Emphasis added.)[2]

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1. The State Board of Education has traditionally maintained that the Missouri compulsory attendance law required a school child to remain in his assigned school for six hours a day, State Regulations Title I State Department of Education (R. Vol. III, pp. 26 and 27), and the Court of Appeals noted that shared time, or dual enrollment, is presently unlawful in Missouri. (Petition for Writ of Certiorari—A18, A19.) At least, for practical purposes, the requirements of Title I ESEA cannot be satisfied by dual enrollment at this time. See: *Special District* v. *Wheeler*, Mo., 408 S.W. 2d 60.

2. There is no Missouri Constitutional provision, statute or court decision which provides that public personnel under Title I may not render services on private school premises. In fact, the Attorney General of Missouri has ruled to the contrary that such is permissible. See: subargument (3), *infra*.

Because of the limitations imposed by the Missouri State Board of Education, educationally deprived children in nonpublic schools in Missouri could not receive the benefit of Title I personnel services during regular school hours. They were limited to the receipt of such services after regular school hours, in the evenings, on weekends, and during the summer. (R. Vol. III, p. 27.)

The State Board of Education must find itself in a lonely, if not ridiculous, position in asserting that educationally deprived children in private schools in Missouri can receive the comparable and equitable educational benefits provided for them in the Act through means *other than* dual enrollment and mobile educational services. From the time of the hearings on the Bill onwards, it was clear that participation by private school children in special educational services would be by means of dual enrollment or by making public school personnel available on private school premises. 45 C.F.R., Sec. 116.19; USOE Program Guide No. 44 (P. Ex. 5, R. Vol. III, p. 25); Senate Report 146, 1965 U.S. Cong. and Admin. News, 1456, 1457; The Church State Controversy and Your Schools, Eugene J. Murphy, Vol. 10, School Management, page 117; Oct., 1966; Vol. 96, School and Society, page 24, January, 1968. Even those who opposed participation by private school children predicted that the enactment of Title I ESEA would be followed by a "massive infusion of Federal funds designed to extend" the pattern of dual enrollment. (Testimony of George R. LaNoaue and Lawrence Speiser, Hearings Before the Subcommittee on Education of the Committee on Education and Labor, 89th Cong. on H.R. 2361 and H.R. 2362, page 1659 et seq.)

The situation in this case does not exist in any other state in the union. Missouri is unique in its practices of excluding educationally deprived children enrolled in pri-

vate schools from receiving equitable benefits under Title I ESEA.

In a letter to State Commissioner of Education Mallory dated October 22, 1971, the United States Commissioner of Education, S. P. Marland, Jr., stated as follows:

> "As I understand the position of the State educational agency in this matter, you feel that Missouri State law precludes both the provision of Title I services on private school premises (a position with which your Attorney General does not agree) and dual enrollment or shared time programs in which private school children could participate in Title I projects on public school premises during regular school hours. Needless to say, this policy severely limits the type and amount of benefits which educationally deprived children in private schools may receive under Title I. To my knowledge, *Missouri is the only State in the nation which has taken this extreme position on the provision of Title I services.*" (R. Vol. IV, Plaintiffs' Exhibit No. 2, offered in evidence R. Vol. III, p. 19.) (Emphasis added.)[3]

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3. In its annual report to the President and Congress for 1972, the National Advisory Council on Education of Disadvantaged Children (established pursuant to 20 U.S.C., Sec. 2411) stated at page 29 of the Report:

> "In order to receive title I funds, the State Attorney General must sign an assurance to the U.S. Commissioner of Education stating that all title I regulations will be observed, even if they conflict with State law. Yet with respect to three States—Missouri, Nebraska, and Oklahoma—the Office of Education is aware of noncompliance with the regulations, section 116.19, on service to children enrolled in nonpublic schools, and no enforcement action has been initiated.
>
> *"The Council recommends that any State which is not in compliance with section 116.19 be informed of the Commissioner's intention to enforce the law, by the end of fiscal year 1972."* (Emphasis original.)

(Continued on following page)

Pursuant to a request of the Eighth Circuit Court of Appeals, a survey of Title I programs was done by the United States Office of Education. That survey revealed

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Footnote continued—

Nor is the "extreme position" of the Missouri State Board of Education limited to Title I programs. In a speech entitled, "Urban Education: Partnership for Survival," delivered on January 10, 1973, in Washington, D.C., S.P. Marland, Jr., Assistant Secretary for Education, HEW, stated:

> "By law and tradition and disposition Missouri is far and away the most stringent State in the country prohibiting public assistance for nonpublic schools. I am certain that abuses can be found in many other places, but the other States, almost without exception, have in general found ways to provide equitable services to nonpublic schools. Some have adopted shared-time programs. Missouri has ruled such efforts illegal. Some have said that a public school teacher can go into a nonpublic school to provide limited remedial services that are wholly paid for out of Federal funds. That has been allowed in State after State. Missouri has said no.
>
> "The issue in Missouri has come to a head in connection with two programs in Jennings and Jefferson City that are funded under Title III of the Elementary and Secondary Education Act of 1965. We have discovered that while the programs were providing services to the public school children during the school day and in their regular classrooms, similar services were available to nonpublic children only after school and in non-classroom settings with offerings extended to Saturdays. There is simply no equity in such practices. Services to nonpublic children must be provided in ways comparable to those of the public schools - - - during the school day and in the regular classroom. If this failure is not corrected, the Office of Education intends to invoke for the first time the so-called 'by-pass' provision of Section 307 (F) of the Elementary and Secondary Education Act."

On October 30, 1972, the United States Commissioner of Education, after investigating the operation of Title III ESEA projects in Missouri invoked his power to by-pass State administration in regard to providing services to nonpublic school children after determining that in certain Title III ESEA projects in Missouri, "There are inadequate opportunities for effective participation on an equitable basis in these projects by children enrolled in private elementary and secondary schools in the area served. Accordingly I have determined that there is substantial inability or failure to provide for effective participation on an eligible basis for eligible children." (Partial text of a telegram from acting U.S. Commissioner of Education, Peter Muirhead, dated October 30, 1972, and addressed to Arthur L. Mallory, Commissioner of Education of Missouri.) In 1973, fourteen Missouri Title III programs were "by-passed."

that Missouri is the only State in the nation which both prohibits educationally deprived private school children from participating in dual enrollment programs and also prohibits Title I instructional services from being provided to educationally deprived private school children on private school premises during the regular school hours. That survey is reprinted as an Appendix to this brief.

The Court of Appeals found that Petitioners "flagrantly" violated the Act. Let us examine some of the evidence of the gross inequities caused by Petitioners' actions.

(a) Title I project expenditures in Missouri indicate gross inequity.

The approved Title I applications of the St. Louis, Kansas City, Berkley, and Linn Public School Districts were introduced as exhibits in the case. (St. Louis is Defendants' Exhibit No. 3, R. Vol. VI offered in evidence R. Vol. III, p. 11; Kansas City Application is Plaintiffs' Exhibit No. 7, R. Vol. IV offered in evidence p. 64, and also appears as part of Plaintiffs' Exhibit No. 8, R. Vol. V offered in evidence p. 144; Linn Application is Plaintiffs' Exhibit No. 9, R. Vol. V, offered in evidence p. 106, and also appears as part of Defendants' Exhibit No. 9a, R. Vol. VII, offered in evidence p. 108; the Berkley Application is Plaintiffs' Exhibit No. 10, Vol. V, offered in evidence p. 106, and also appears as part of Defendants' Exhibit No. 10a, R. Vol. VII offered in evidence p. 108.) These are a representative sample of all Title I applications in Missouri. They include two metropolitan districts, a suburban district and a rural district. The allocation of funds to St. Louis and Kansas City accounts for almost one-third of all Title I funds expended in Missouri. (R. Vol. III, p. 164.)

These exhibits are very lengthy, and for the convenience of the Court, Respondents have made the following comparative analysis of the approximate expenditure per pupil in each of these four Title I programs.

School District	Expenditure per public school child	Expenditure per private school child
Berkley	$210	$85
Linn	$244	$30
Kansas City	$250	$25
St. Louis	$242	$10

NOTE: Respondents do not contend that Title I ESEA requires an equal expenditure of funds per public and per nonpublic school child. USOE Handbook, p. 5. Respondents do contend that where the assessed needs of the children are the same, Title I ESEA requires that both private and public school children receive services which are comparable and equitable. 45 C.F.R., Sec. 116.19 (a) and (b); USOE Handbook, p. 6; USOE Program Guide No. 44, Sec. 4.5. (Reprinted in USOE Handbook at p. 41.) Respondents introduced these expenditure figures because they are an indicia of lack of comparability of services. USOE Handbook, p. 38. Further, this evidence demonstrated that Petitioners did not comply with their own "Policy No. 2" regarding per pupil expenditures which will be discussed later.

Ed Downey, in charge of Title I for the Kansas City Public School District, testified that to the best of his recollection, during fiscal year 1972, the average per pupil expenditure for public school children participating in the Title I program was $275, whereas the average per pupil expenditure for private school children was $40 or $50.

(R. Vol. III, p. 69.) In October, 1972, the United States Commissioner of Education found that the Title I project for Kansas City and two other school districts did not comply with federal regulations regarding participation of private school children. (R. Vol. III, pp. 168 and 169.) In an effort to equalize per pupil expenditures, in February, 1972, the Kansas City Public School District amended its project to provide several times more equipment and supplies for lending to nonpublic school children. Mr. Downey estimated that an additional expenditure of $61,356 was necessary to equalize the expenditure for private school children as compared to public school children. Prior to this recommended change, only $19,624 worth of equipment and supplies and $7,770 worth of administrative services were available to eligible children enrolled in private schools in Kansas City. (R. Vol. VI, Defendants' Exhibit No. 1, Memorandum from Ed Downey to Robert F. Simon date January 28, 1972, offered in evidence R. Vol. III, p. 48; also See: R. Vol. III, p. 77.)

Petitioners, Missouri State Board of Education, adopted a state guideline known as Policy No. 2. Paragraph No. 12 of that Policy stated as follows:

> "The average cost per pupil enrolled in a private school and participating in a Title I, ESEA, program and the average cost per pupil enrolled in a public school and participating in a Title I, ESEA, program will be used as a guide in making the State Department of Education approval. If the variance is greater than 10 per cent (more or less) justification will be requested before making approval." (R. Vol. IV, Plaintiffs' Exhibit No. 6, offered in evidence R. Vol. III, p. 28.)

D. D. McCullough, Title I Director for the State Department of Education, testified how *in practice* this policy was implemented. He testified as follows:

"Q: Would you exclude the amount of money expended for personnel from your calculation of per capita expenditure because of this constitutional thing you mentioned?

"A: At the non-public school? I don't follow you.

"Q: Let's try some illustrations. Let's assume there is a remedial reading program; that the public school program includes teachers and teachers' aids, and equipment, materials, and supplies. And the non-public school program is operated by volunteers and not through Title I funds.

"As far as Title I funds, they would have equipment, materials, and supplies.

"Let's say the amount of the equipment, materials, and supplies expended for public and non-public were equal per capita, say $10 a child.

"Now then, the amount of personnel in the budget—

"A: —would be excluded.

"Q: —would be $200 per child for public school children; would you exclude this $200?

"A: In figuring the variance, yes.

"Q: The equipment is equal, therefore it complies with Policy No. 2?

"A: Right." (R. Vol. II, McCullough Deposition, pp. 65 and 66.)

McCullough went on to testify at another point as follows:

"Q: Now, let's go back to the hypothetical case we had awhile ago where $250 was expended per pupil in public schools in $50 was expended per pupils in non-public schools, but the equipment was equal and the $50 worth of equipment was in public schools and $50 within non-public, and the $200 per capita in the public schools was for personnel.

"Now, you stated earlier that you would just compare the equipment, since personnel is excluded?

"A: That is correct.

"Q: Would you regard that situation as being in compliance with the federal regulation and guide (45 C.F.R., Sec. 116.19(b) and Program Guide No. 44, Sec. 4.5) we have just discussed regarding comparable participation?

"A: Yes." (R. Vol. II, McCullough Deposition, pp. 95 and 96.)

The Court of Appeals found that "the Title I programming within Missouri school districts flagrantly breaches the State Commissioner's own statement of policy (Policy No. 2)." *Barrera, supra,* footnote 8 at 1345 (parens. added).

Prior to trial, Respondents applied for a preliminary injunction which would have in effect ordered Petitioners to comply with their own Policy No. 2. In connection with that proceeding, Petitioners admitted that if the Preliminary Injunction were granted, it would have been necessary for them to "reallot between $5 million and $6 the next three months." (R. Vol. III, p. 29.)

Even the District Court found that there was "an undoubtedly inequitable expenditure of Title I funds be-

tween educationally deprived children in public and nonpublic schools in some local school districts in the state." (Petition for Writ of Certiorari, p. A41.)

Apart from comparing expenditure of funds, an examination of the approved Title I applications in evidence shows that although the needs of educationally deprived children attending private schools were similar to those in public schools, deprived children in public schools were provided comprehensive services whereas private school deprived children were given mere token benefits.

(b) The scope and quality of programs offered to educationally deprived children attending nonpublic schools in Missouri were also very inequitable.

As might be expected from the gross inequities in expenditures, there were in fact large differences in the actual benefits offered to educationally deprived children depending on whether they were attending a public or a nonpublic school.

An examination of the Title I application of the Kansas City Public School District *as approved by the Petitoners* shows that the following services were available to deprived public school children: remedial reading at the elementary and secondary levels, an intensified parent program, an instructional services center, a fine arts theater, a remedial language development program, two Follow-Through programs, an extended day kindergarten, and a remedial mathematics and science program. By comparison, deprived children attending nonpublic schools could only participate in the fine arts theater, and their teachers could attend the instructional service center. Over 68 full-time, and over 43 part-time certified staff members provided services to public school children; whereas nonpublic school children received no benefits from Title

I personnel. (Vol. V, Plaintiffs' Exhibit No. 8, offered in evidence R. Vol. III, p. 144) This project was later revised after pressure from USOE.

According to an "Abstract of Approved Projects" prepared by Petitioners' Title I Supervisor, Lloyd Boyd, analyzing the Title I application of St. Louis City, the following services were available to public school children: "Rooms of 15" (a full-time compensatory education program), remedial reading, a program for socially maladjusted high school students, an instructional supplementary services program, a study-learning resources center, audio-visual services, an instructional materials center, a curriculum center, a Follow-Through program, a Work Study program, and a reading assistance program. The project called for 352 certified personnel, and 357 non-certified personnel at an estimated expenditure of $4,270,485. On the date that this project was approved, *no activities* at all were proposed for nonpublic school for educationally deprived children attending nonpublic schools. (R. Vol. VI, Defendants' Exhibit No. 3, unnumbered pages 2 and 3, offered in evidence R. Vol. III, p. 11.) Subsequently, about $20,000 of Title I services were provided for nonpublic school children.

Burrell Laney, a Regional Supervisor for the State Department of Education, testified regarding the Title I program at Joplin, Missouri. According to his testimony, the Joplin Title I program made available to private school children a tutorial service in reading, language arts, math, social science, and design offered from 3:30 to 5:00 after school hours. (R. Vol. III, pp. 124 and 127.) On the other hand, Title I services available to public school children during regular school hours and on the school premises where they normally attended were the following: remedial reading, remedial math, remedial lan-

guage arts, an audio-visual center, library services, health services, guidance services, teacher aides, a tutorial program, a summer arts and crafts program, and a learning disabilities center. (R. Vol. III, pp. 132 to 134.)

In the Linn Public School District, deprived public school children had the opportunity to participate in a remedial science program, a remedial math program, a remedial reading program, two small class instruction programs, and a library program all of which were staffed by certified personnel. On the other hand, nonpublic school children were only allowed to participate in a Saturday remedial program, although 36% of the educationally deprived children attended nonpublic schools, 63 out of a 173 total. Only 7% of the program budget provided services to nonpublic school children. Needy public school children had the services of 6 full-time certified staff members. By comparison, nonpublic school children received services on Saturday only from two part-time certified staff members. (R. Vol. V, Plaintiffs' Exhibit No. 9 offered in evidence R. Vol. III, p. 106.) After a complaint, the Linn project was amended to add additional Saturday services. (R. Vol. VII, Defendants' Exhibit 9a, offered in evidence R. Vol. III, p. 108.)

(c) Programs without personnel or after-hour programs are ineffective and necessarily uncomparable.

As we have seen, Petitioners in their administration of Title I limited the participation of educationally deprived children enrolled in nonpublic schools basically to equipment loans and after-hour programs. No one seriously believes that such programs provide "genuine opportunities" for participation. Even if equal or even greater funds were spent on such programs, the evidence in this case conclusively supports the Court of Appeals

finding that these children still would not receive comparable benefits from Title I. The most effective type of services is that provided by a teacher or other specialist during regular school hours. There is nothing comparable to the services of personnel except the services of personnel.

The Court of Appeals found, "It is not a comparable program where the need for remedial services of the educationally deprived private school pupil is at least equal to that of the educationally deprived public school student, and the only service provided to the private school child is the furnishing of equipment." *Barrera, supra,* at 1348.

Equipment alone does not constitute a program. Equipment and materials are merely supportive of the Title I activity. USOE Handbook, p. 11. Federal and state guidelines restrict equipment, materials, and supplies to not more than 15% of the Title I budget. (R. Vol. III, p. 167.)

Mr. Downey testified:

> "It is most difficult for special services to be provided without personnel as evidenced by . . . the public school making use of such personnel to carry out an effective program." (R. Vol. III, p. 41.)

He stated that it was possible to spend the same amount of money per child in private school as per child in the public school without sending personnel to the private school child. However, he went on to clarify by stating, "It would be comparable in dollar amount spent, in my judgment, but would not be comparable so far as . . . . educationally most appropriate." (R. Vol. III, pp. 75 and 80.)

The ineffectiveness and disadvantages of after-hour programs was attested to by witnesses for both Petitioners and Respondents.

Sister Agnes Marie Hagan, Principal of the private school at which some of the Respondents attend, testified that after school programs did not succeed at all. They had been tried under the Model Cities program, but she said, "It was just almost an impossible situation to get the children to go to a class after school hours." (R. Vol. III, p. 100.)

Hubert Wheeler, retired State Commissioner of Education, testified that it would be at a disadvantage to provide Title I services after school hours.

"Q: Would it be a disadvantage to provide Title I on Saturdays?

"A: If you can get it on other days, it certainly would.

"Q: How about during the summer, if you could get it during the school year?

"A: Thinking of my 16 year old daughter, I would a lot rather they would get it in the nine months' time than to have to go in the summer time, too. Everyone would feel the same way I think." (R. Vol. II, Deposition of Hubert Wheeler, pp. 87 and 88.)

D. D. McCullough, Title I director for the Missouri State Board of Education, testified as to a number of disadvantages of programs operated outside of regular school hours. He stated that transportation was a problem. After-hour programs were more costly, and educational time was lost. Furthermore, most personnel do not like to work overtime. (R. Vol. II, Deposition of D. D. McCullough, pp. 44 and 45.)

Burrell Laney, a Regional Supervisor of Title I projects for the Missouri State Board of Education, testified that the vast majority of public school programs under Title

I were operated during regular school hours. In the region under his supervision, 68 out of 70 school districts provided public school programs during regular school hours. (R. Vol. III, p. 134.)

Ed Downey, Title I Specialist for the Kansas City Public School District, testified that especially in the inner city children with special needs have an aversion to summertime classes, and participation is low. (R. Vol. III, p. 68.)

The criteria established by the United States Commissioner of Education states that services provided at inconvenient hours and locations "do not meet the 'comparability' factor mentioned in the regulations." Program Guide No. 24 (Reprinted in USOE Handbook, p. 38) 45 C.F.R., Sec. 116.17(a).

Where a statute has received a contemporaneous interpretation and the statute as interpreted is re-enacted, such interpretation is accorded considerable weight and is regarded as the presumptively correct interpretation of the law. *United States* v. *Anderson*, 269 U.S. 422. In this connection, the House Committee on Education and Labor submitted a Supplemental Report to accompany HR 1316 in 1966. This Report dealt with the amendments to the Elementary and Secondary Education Act of 1965. The House Committee commented on and concurred with the first Report of the National Advisory Council on Education of Disadvantaged Children (Report to the President on January 31, 1966). In this Report, the Council stated:

> "We wish to emphasize this by special reference to our intentions expressed last year. These projects under public auspices contemplate broadened instructional offerings and special educational services and arrangements that meet the needs of the educationally deprived children attending nonpublic schools. These

projects may not supplant the regular private school curriculum. Solutions to overcome educational deprivation require a high degree of imagination, flexibility, and creative new avenues of cooperation within the community. Within the limitations of the act we are eager to preserve and encourage local determinations of remedies for local problems." (Supplemental Report, Report No. 1814, Part 2, 89th Congress, 2d Session, p. 3.)

The Committee then stated:

"While the Committee and the Council have emphasized the importance of adherence to Constitutional safeguards, the Committee does not expect that such considerations will be simply a device by which only a token communication with private school administrators is extended, or worse yet, by which the projects in which private school children can participate are *inconvenient* (*for example, scheduling programs other than during regular hours of school attendance*) *awkwardly arranged, or poorly conceived.* To the contrary, it is expected that earnest efforts will be made to ascertain from private school administrators an accurate appraisal of underachievement and other special needs of educationally disadvantaged children who do not attend the public schools. Projects for such children should be so designed as to effectively eliminate those factors which preclude the educationally deprived child from gaining full benefit from the regular academic program offerings in the private institution in which he or she may be enrolled." (Emphasis added.) Supplemental Report, Report No. 1814, Part 2, 89th Congress, 2d Session, p. 3.

In order to obviate any different interpretation, the Committee Report stated that:

"Nothing contained in House Report 1814 (The Report on the '66 Amendments) contradicts any commentary in House Report 143, 89th Congress, First Session, which Report is the controlling view of the Committee with respect to Public Law 8910." (Supplemental Report, *supra*, note 2 p. 2.)

This Supplemental Report is particularly valuable since it was made within a year of the enactment of ESEA and during the process of amendments which explicitly affirmed the '65 legislation. Moreover, it concurs with the first Report of the Council and emphasizes the proposition that children in nonpublic schools should not be deprived of the benefits of the law due to arguments based on state constitutional considerations which are not controlling.

The testimony that after-hour programs are not comparable to regular hour programs is uncontradicted in the record. The Court of Appeals found "It is not a comparable program to provide only after-hour and summer remedial instruction on neutral sites which are open to the private school children while offering the same services during regular school hours for deprived public school pupils, especially when the partial expense for transportation must be borne by the private school child who comes from the low-income family." *Barrera, supra*, at 1348.

(3) Petitioners' claims of state law limitations and discretion as defenses for these inequities are invalid.

In defense of their manifestly inequitable practices, petitioners claim that this is within their administrative discretion and that purported state law limitations excuse their acts.

Petitioners contend that they have "wide discretion" in administering Title I programs. Respondents are well aware of the provisions of 20 U.S.C., Sec. 1232a, which prohibit federal control of local curriculum, instruction, etc. Respondents agree the choice of teaching methods, textbooks, and materials and other pedagogic matters are and should be with the local public educational authorities. Even without Section 1232a, the whole of Title I ESEA clearly indicates that the design of educational programs is the responsibility of the local public school agency. (Note this discretion is at the *local* and not state level. See: Senate Report No. 146, 1965 U.S. Cong. and Admin. News 1446, 1457.) However, what is at issue in this case is not the choice of pedagogic methods, but the practical exclusion of educationally deprived children enrolled in private schools from 70% of Title I services available in Missouri.

As the Court of Appeals observed, "no particular program, curriculum or service, is mandatory under the Act." *Barrera, supra,* at 1354. However, "the law specifies that instructional services and related activities *must* be provided for eligible private school children before an application for a grant may be approved by the state educational agency." USOE Handbook, page 1. (Emphasis added.) The Act clearly requires the providing of Title I services to meet the special educational needs of educationally deprived children enrolled in private schools. 20 U.S.C., Sec. 241e(a)(1) and (2). This requirement is further spelled out in the regulations (45 C.F.R., Sec. 116.19) and the other criteria established pursuant to law by the United States Commissioner of Education. Further see: subpoint (1) *supra.*

Petitioners do not have "discretion" to violate the requirements of the Act.

Petitioners also assert that they are excused from complying with the requirements of Title I ESEA regarding the participation of private school children because of alleged limitations of state law. (Petitioners' Brief, pp. 20 et seq.) The Court of Appeals found "that the grants under Title I must accommodate state law." *Barrera, supra*, at 1351. Respondents do not contest this finding. The Act does not require state officials to violate state laws. On the other hand, the existence of state laws does not excuse state officials from complying with the requirements of the Act.

In the words of the United States Office of Education, "While state constitutions, laws, and their interpretation limit the options available to provide services to private school students, this fact, in itself, does not relieve the state educational agency of its responsibility to approve only those Title I applications which meet the requirements set forth in the federal law and regulations." USOE Handbook, p. 20. Also see: Congressional Committee Supplemental Report No. 1814 quoted *supra*.

If state law were to prevent Missouri from providing equitable benefits to educationally deprived children attending private schools, then Petitioners are unable to give the assurances required by 20 U.S.C., Sec. 241f and Missouri must forego participation in the program.

The Court of Appeals expressed it in this way:

"The state could conceivably pass a law that would prohibit the use of *any* Title I funds in a private school. Assuming such a law could overcome equal protection arguments, the net effect would be that the state could not comply with the Title I requirement that comparable services be administered to educa-

> tionally disadvantaged nonpublic school children. Under those circumstances, the state would not be entitled to a Title I grant and would have to make the 'political' decision of whether to repeal the law or deprive all of its educationally disadvantaged children of the economic benefits of the Act." *Barrera, supra,* at 1352.

State law does not limit services of Title I personnel: The discussion of whether or not state law limitations excuse state educational agencies from complying with the requirements of Title I ESEA is academic for the reason that although Petitioners have asserted that Missouri law prohibits Title I personnel from providing services on nonpublic school premises, no judicial or legal authority has ever concurred in their assertion.

The Missouri Attorney General, in an official opinion issued January, 1970, held that Title I personnel may be made available on private school premises to provide special services to eligible children and that Missouri law would not prevent public school personnel paid with federal funds from providing these services on the premises of a private school. *Barrera, supra,* at 1350, footnote 20.

The Court of Appeals stated:

> "The *only* control a state board has over such (Title I) funds is to channel them to local agencies and to review the programs of the local educational agencies to make certain that programs are consistent with the Act and the Commissioner's regulations. A state cannot pass a law or interpret its own laws to say that a Title I grant is to be considered state funds or public funds for the maintenance of free schools." (Emphasis original.) *Barrera, supra,* at 1352.

It is also to be noted that the Missouri Constitution expressly provides:

> "Money or property may also be received from the United States to be redistributed together with public money of this State *for any public purpose designated by the United States.*" Missouri Constitution, Article III, Section 38(a). (Emphasis added.)

Petitioners in their zeal would "prohibit (the United States) from extending its general (federal) law benefits to all citizens without regard to their religious belief." Paraphrase of *Everson* v. *Board of Education*, 330 U.S. 1, 16.

Thus, Petitioners cannot excuse their practices by protestations of discretion or state law limits.

(4) Title I authorizes public school personnel to provide special educational services to educationally deprived children on private school premises.

The Act enumerates examples of special educational services and arrangements which may be provided to educationally deprived children enrolled in private schools. Included in these examples is "mobile educational services". 20 U.S.C., Sec. 241e(a)(2).

"Mobile educational services" are services that come to the child such as "a public school teacher comes onto the private school premises to teach a remedial class; a mobile teaching lab with equipment and a teacher makes regular scheduled stops at a private school; a speech therapist works with private school children at the private school." USOE Handbook, p. 11.

The floor debate in the House of Representatives clearly indicates an intent to permit public employees un-

der Title I to provide special educational services to deprived private school children by going into a private school building. In the debate, the sponsors of the bill distinguished between special services which were permitted and general education which was prohibited, and also between a private school building as a place for rendering services and the private school as a juridical person. Because other Congressmen did not have these distinctions clearly in mind, there was at first some confusion which, however, was ultimately clarified.

One of the amici in their brief, by taking certain quotes out of context, has tried to convey the impression that the Congress did not intend to make Title I personnel available on private school premises. For example, at one point Congressman Perkins stated, "We do not intend to put teachers in private schools, no." 111 Cong. Rec. 5571 (1965). However, when read in context, what Congressman Perkins was saying was that public school teachers could not provide general services on private school premises, but only special services directed to the assessed need of the private school child. For example, on the next page, Congressman Perkins stated, "There are special services as to which I would say 'yes', but generally 'no'." 111 Cong. Rec. 5572 (1965).

The supporters of the bill stated that Title I services were to be provided at private school buildings, but were not to be under the jurisdiction or part of the regular instructional program of the nonpublic school. Note the statements of Congressman Carey (a member of the Education Subcommittee) making this distinction. 111 Cong. Rec. 5571 (center column) and 5579 (third column) (1965).

The whole discussion was summed up by Congressman Thompson in these words:

"Services and arrangements provided for nonpublic school students must be special as distinguished from general educational assistance.

"The decision about the best arrangement for providing special educational assistance under Title I is left to the public education agency of the school district, under the constitution and the laws of the State.

"Thus, public school boards could make available the services of such special personnel as guidance counselors, speech therapists, remedial reading specialists, school social workers who would reach the non-public-school children in the public schools or through public services in the nonpublic school buildings, or through mobile services, or through ETV, or through community centers, et cetera. But these special services would not be part of the regular instructional program of the nonpublic schools. Thus, nonpublic schools could not get general classroom teachers in history, English, mathematics, and social studies." 111 Cong. Rec. 5895 (1965).

Both Representative Powell of New York, Chairman of the House Committee, and Representative Perkins of Kentucky, the sponsor of the Bill, and Chairman of the Subcommittee which reported the legislation, fully agreed with Mr. Thompson's clarification of the issue. Committee members such as Congressman Carey of New York and Congressman Cahill of New Jersey, who actively participated in the debate, likewise agreed that this was an accurage summation of the intent of the House. 111 Cong. Rec. 5583, 5894-95 (1965).

Though other statements may appear in the Record in the House debate, the only definitive statement of intent is the statement by Mr. Thompson which, as indicated,

received the full agreement of the sponsor of the Bill and the Chairman of the Full Committee.

More persuasive as to the meaning of a legislative enactment, are the committee reports. *Spiegel's Estate* v. *Commissioner of Internal Revenue,* 335 U.S. 701 (1949). The Congressional committee reports clearly express the intention that Title I personnel may be made available on private school premises to provide special services. In the Senate Report we find this statement:

> "Thus, the Act does anticipate broadened instructional offerings under publicly sponsored auspices which will be available to elementary and secondary school students who are not enrolled in public schools.
>
> "It is anticipated, however, that *public school teachers will be made available to other than public school facilities only to provide individualized services which contribute particularly to meeting the special educational needs of educationally deprived children (such as therapeutic, remedial or welfare services) and only where such specialized services are not normally provided by the nonpublic school.*
>
> "In this regard the Committee has reviewed carefully the language in the bill to assure that the local educational agency will maintain administrative supervision and control of the programs provided under the Title and that the title to any property constructed or purchased shall be in a public agency and that a public agency will distribute the funds and property for the purposes of the Title." (Emphasis added.) Senate Report No. 146, 89th Congress, First Session, 1965 U.S. Congressional and Administrative News at 1457.

This legislative history has been carried forth by the Commissioner in his regulations which provide that Title

I personnel may be made available on private school premises when necessary to provide special educational services for educationally deprived children enrolled in private schools so long as the service is not already provided by the private school. 45 C.F.R., Sec. 116.19(e). Also note that the regulations provide that Title I projects should be carried out at locations where the needs of the educationally deprived children may best be served. 45 C.F.R., Sec. 116.17(a). Also regarding Title I personnel on private school premises see: USOE Program Guide No. 24, Sec. 10. (Reprinted in USOE Handbook, p. 36.)

Petitioners argue that Title I must be *construed* to prevent publicly employed teachers furnishing educational benefits on private school premises. Petitioners cannot nullify and evade the command of the Congress, and justify its actions by a totally unwarranted construction of the Statute. As was clearly pointed out in *United States* v. *International Union United Automobile, Aircraft & Agricultural Implement Workers of America*, 352 U.S. 567, 589 (1957), and as may be appropriately said of this case:

> ". . . Here only one interpretation may be fairly derived from the relevant materials. The rule of construction to be invoked when constitutional problems lurk in an ambiguous statute does not permit disregard of what Congress commands."

Also see: *Yu Cong Eng* v. *Trinidad*, 271 U.S. 500, at 518.

Based on the Act and an examination of the legislative history the Court of Appeals found that Title I clearly does permit public personnel to serve educationally deprived children on private school premises. *Barrera, supra*, at 1349.

(5) Conclusion.

Since there can be no doubt that Title I requires either "dual enrollment" or "mobile educational services" for genuine participation by educationally deprived children attending private schools, it follows that since programs of dual enrollment are not available in Missouri, then programs which provide for sending public school, Title I, personnel onto private school premises are essential to the lawful implementation and operation of Title I for educationally deprived children in private schools, based on their needs. This is the essence of the Court of Appeals' decision and certainly the Court of Appeals could reach no different conclusion here.

Respondents submit that the Court of Appeals correctly held that Title I ESEA requires that educationally deprived children in both public and private schools receive equitable and comparable services based on their determined needs; that it is permissible under Title I ESEA for public personnel to provide special services to educationally deprived children on nonpublic school premises; that it is not comparable or equitable where the needs of the children are equal to provide remedial instructional services to deprived public school children during regular school hours and only to provide equipment or after-hour and summer instruction to deprived children attending private schools; and that under the facts presented in Missouri, if special services during regular school hours are furnished to public school children on their regular school premises, then, based on their need, such services must be provided to deprived private school children at the private school premises.

II

It does not violate the Establishment Clause if public school employees in serving the needs of all educationally deprived children provide Title I services at the premises of private schools.

Neither the District Court nor the Court of Appeals passed upon the constitutional issue which Petitioners have raised in this Court. The question of whether or not the issue is properly before this Court is presented in a separate argument.

In *Lemon-DiCenso-Sanders*[4] and *Levitt-Nyquist-Sloan*,[5] this Court invalidated state statutes for failure to meet one or more of the three tests of secular purpose, primary effect, and excessive entanglement. What common defects led to the invalidation of these state laws?

(1) All were enacted during a period of financial crisis in nonpublic education and with the expressed legislative intent to solve this crisis. As expressed by Justice Powell, ". . . at bottom its (the statutes) intended consequence is to preserve and support religion-orientated institutions." *Sloan, supra*, at 2986.

(2) Each involved a direct cash payment to either a nonpublic institution or an unrestricted grant or tax benefit to a nonpublic school parent.

(3) In *Levitt, Nyquist*, and *Sloan*, "the aid that will be devoted to secular functions is not identifiable and

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4. *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971); *Earley* v. *DiCenso*, 403 U.S. 602 (1971); *Sanders* v. *Johnson*, 403 U.S. 955 (1971).

5. *Levitt* v. *Committee for Public Education and Religious Liberty*, ____ U.S. ____, 93 S.Ct. 2814 (1973); *Committee for Public Education and Religious Liberty* v. *Nyquist*, ____ U.S. ____, 93 S.Ct. 2955 (1973); *Sloan* v. *Lemon*, ____ U.S. ____, 93 S.Ct. 2982 (1973).

severable from aid to sectarian activities." *Levitt, supra,* at 2819. And in *Lemon, DiCenso,* and *Sanders,* although the assistance was limited to secular functions, enforcement of that limitation required surveillance of private school personnel and maintenance and auditing of nonpublic school records.

(4) In each of these cases, the beneficiary class was limited to nonpublic education. In the words of Justice Powell, "The state had singled out a single class of citizens for a special economic benefit." *Sloan, supra,* at 2986. This Court has concluded that the state's establishment of a special beneficiary class creates competition between public and nonpublic education for public funds. And, in the words of Justice Powell, ". . . in terms of the potential divisiveness of any legislative measure the narrowness of the benefitted class would be an important factor." *Nyquist,* 93 S.Ct. 2955, 2976.

On the other hand, in *Everson* and *Allen, Tilton* and *McNair,*[6] this Court upheld state and federal programs assisting both public and nonpublic education. Why did these statutes pass constitutional muster? We shall limit ourselves primarily to *Everson* and *Allen,* since the statute presently before the Court deals with elemenetary and secondary education and not higher education.

(1) Neither the statute in *Everson* nor in *Allen* was enacted against the history of financial crisis in nonpublic education. The declared legislative concern was for the public welfare and safety.

(2) In neither *Everson* nor *Allen* were public funds paid directly to sectarian institutions, nor through parents

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6. *Everson* v. *Board of Education,* 330 U.S. 1 (1946); *Board of Education* v. *Allen,* 392 U.S. 236 (1968); *Tilton* v. *Richardson,* 403 U.S. 672 (1971); *Hunt* v. *McNair,* ____ U.S. ____, 93 S.Ct. 2868 (1973).

to the institutions. The reimbursement to the parent in *Everson* was not for payments to a sectarian institution, but for the cost of *public* transportation. In both cases, the primary intended beneficiary and beneficiary in fact was the child. Any benefit to religious institutions was "indirect," "remote," or "incidental."

(3) The benefits were clearly restricted to the secular. Enforcement of the secular limitation was within the control of public authorities and did not require supervision of nonpublic school personnel or records.

(4) The services were supplied in common to *all* students. Rather than creating special classes, competition and divisiveness, the programs treated all in common and alike, thereby creating equity and unity. Note: Justice Powell's analysis in *Nyquist, supra* at 2966-67 and 2970, footnote 38.

With this brief analysis, let us turn to the specifics of Title I ESEA.

(1) History and legislative intent of Title I.

The historical causes of the Elementary and Secondary Education Act were the historical causes of the War on Poverty. The intent was to break the "cycle on poverty" by providing special assistance to educationally deprived children in low-income areas.

When President Johnson delivered his education message to Congress on January 12, 1965, proposing Title I and other educational programs, he emphasized problems of school dropouts, and problems of unemployment, etc. 1965 Cong. Quarterly Almanac, p. 1374. In presenting Title I on the floor of the House of Representatives, the sponsors of the Bill called attention to national problems caused by basic educational deficiencies. They noted such

things as draft rejection rates, manpower retraining problems, unemployment rates, and the strong correlation between educational underachievement and poverty. 111 Cong. Rec. 5552 (1965). They expressed concern for the dropout problem. *Id.* at 5560. The Report of the Senate Committee reiterated these purposes. The Report states that the bill represents a national determination that "poverty no longer be a bar to learning, and learning shall offer an escape from poverty." Senate Report No. 146, 1965 U.S. Cong. and Adminis. News 1446 at 1449.

These purposes were summed up in a Congressional declaration of policy which is the first section of the Act, and declares a policy to financially assist local public school agencies which serve areas having a concentration of children from low-income families in order to expand educational programs which meet the special educational needs of educationally deprived children. 20 U.S.C., Sec. 241a.

(2) Title I grants funds to public agencies only and provides no direct assistance to nonpublic schools.

Title I funds are granted only to public agencies. 20 U.S.C., Sec. 241c. Control of funds, title to property and administration of the program is required to be in public agencies. 20 U.S.C., Sec. 241e(a)(3)(A). Unlike the statutes held unconstitutional by this Court, Title I makes no grant to a nonpublic institution, employee or patron.

In the words of Congressman Powell, Chairman of that Committee:

> "The Bill does not authorize funds for the payment of private school teachers; nor does it authorize the purchase of materials or equipment or the construction of facilities for private schools. It specifically pro-

hibits any Federal funds being used for religious or sectarian purposes and clearly states that: 'the local educational agency must provide satisfactory assurance that the control of funds . . . the title to property derived shall be in the public agency for the uses and purposes provided in this title and that a public agency will administer such funds and property.'" 111 Cong. Rec. 5558 (1965).

Congressman Perkins, sponsor of the bill, stated:

> "No provision of the bill authorizes any grant for providing any services to a private institution. Nor does the bill authorize payment of private teachers. It does not authorize the purchase of materials or equipment or the construction of facilities for any private school." *Id.* at 5561.

This same understanding was expressed in the Senate. See: Senate Report No. 146, 1965 U.S. Cong. and Admin. News 1446 at 1456.

In an over-zealous effort to make a square peg fit a round hole, Petitioners' Brief makes several erroneous statements regarding the Title I ESEA program and the facts of this case. The first erroneous assertion is that Title I services are "basically everyday regular instruction in subjects such as reading and arithmetic, the same subjects taught in the private schools in *Lemon-DiCenso-Johnson* cases." (Petitioners' Brief, page 26.)

This statement is simply untrue. Title I does not provide general educational services to either public or private school children.

First of all, services are only available, "in school attendance areas having high concentration of children in low-income families." 20 U.S.C., Sec. 241e(a)(1). Fur-

ther see: 45 C.F.R., Sec. 116.17(d) and USOE Program Guide No. 44, Sec. 1.1. (Reprinted in USOE Handbook, pp. 39 and 40.) For example in the Kansas City Public School District there are 99 public schools, but only 22 are eligible attendance areas. There are 24 private schools in the Kansas City District, but only five of these enroll children who reside in the eligible attendance areas. (R. Vol. IV, Plaintiffs' Exhibit No. 7 offered in evidence R. Vol III, p. 64.)

Secondly, Title I only provides programs "which are designed to meet the special educational needs of educationally deprived children." 20 U.S.C., Sec. 241e(a)(1). The projects must be tailored to meet the special educational needs of educationally deprived children and "should not be designed to merely meet the needs of schools or of the student body at large in a school or in a specific grade in the school." 45 C.F.R., Sec. 116.17(g) and Sec. 116.19 (c). Educationally deprived children are expressly defined as those who need special educational assistance because of handicap, proverty, neglect, delinquency, cultural or linguistic isolation, or substandard educational attainment. 45 C.F.R., Sec. 116.1(i).

Thirdly, even special services may not be provided to either public or private school educationally deprived children if the service is already available to the child. Federal funds cannot be used to supplant state and local funds. 20 U.S.C., Sec. 241e(a)(3)(B). The regulations require that an assurance be made that Title I funds "will not be used to provide instructional or auxiliary services in project area schools that are ordinarily provided with state and local funds to children in non-project area schools." 45 C.F.R., Sec. 116.7(h). Additional limitations are prescribed regarding special services extended to educationally deprived children on private school premises. The

regulations require that Title I services be made available "only when such services are not normally provided by the private school." 45 C.F.R., Sec. 116.19(e). For another example of prohibitions against general assistance in connection with educationally deprived children enrolled in nonpublic schools, see: Program Guide No. 24, Sec. 10. (Reprinted in USOE Handbook, pp. 36 and 37.)

In the words of Congressman Carey, "This is not a general instruction bill for the use of nonpublic schools." 111 Cong. Rec. 5568 (1965). The Congressmen had clearly in mind the distinction between special and general educational services and that Title I was restricted to special services. *Id.*, 5568, 5572.

Petitioners also erroneously state that "mentally retarded or emotionally disturbed children are not eligible" to participate in Title I programs. (Petitioners' Brief, p. 12.) Quite to the contrary, the definition of "educationally deprived children" expressly includes "children who are handicapped" (45 C.F.R., Sec. 116.1(i)) and "handicapped children" are defined to include the *"mentally retarded,* hard of hearing, deaf, speech impaired, visually handicapped, seriously *emotionally disturbed,* crippled, or other health impaired children who by reason thereof require special education." 45 C.F.R., Sec. 116.1(o). Also note the expressed references in the Act to programs for handicapped children directly operated by state agencies, such as the Petitioners. 20 U.S.C., Sec. 241c(a)(5) and Sec. 244(6)(B). The reference to the Title I application of the St. Louis Public School District which the Petitioners cite (Petitioners' Brief, Appx. B, p. 44) states that the Title I program therein described will be available to eligible students who are not eligible for classes for the mentally retarded or emotionally disturbed. What this means is that a program for the mentally retarded and

emotionally disturbed is already provided through state and local funds and that the Title I program will not supplant this existing program.

Petitioners also erroneously state that Title I does not involve such services as "medical or dental care, breakfasts and lunches, or even psychological services." (Petitioners' Brief, p. 13.) To the contrary, note the testimony of Petitioners own Title I Coordinator. (R. Vol. III, pp. 162 and 163.) Also see: Illustrations in Senate Report No. 146, 1965 Cong. and Admin. News 1455. Petitioners own Title I application form enumerates the following services as fundable under Title I: attendance services, clothing, food, guidance counseling, dental services, medical services, library services, psychological services, social workers, speech therapy, transportation, special services for handicapped, etc. See for example: the document entitled, "Summary Sheet of Total Project Activities" contained in the Title I application of the Linn Public School District. (R. Vol. V, Plaintiffs' Exhibit No. 9, offered in evidence R. Vol. III, p. 106.)

In *Lemon* the state program paid nonpublic schools for teaching mathematics, modern foreign languages, physical science, and physical education, all courses which were part of the regular school curriculum. *Lemon, supra* at 610. In *DiCenso*, the state program paid a percentage of the regular nonpublic school teachers salary for teaching the regular courses, excluding only religion. *Lemon, supra* at 608. In *Levitt*, the state program paid for teacher-made tests which were part of the regular school program. *Levitt, supra* at 2816 and 2817. In *Nyquist* and *Sloan*, no limitation was made on the grants or tax benefits. Unlike these cases, Title I does not supplant regular services provided by nonpublic schools.

Citing the USOE Handbook, pp. 34 and 35, Petitioners' second erroneous assertion is that it is permissible to employ regular private school teachers to perform educational services under a Title I project. (Petitioners' Brief, pp. 10 and 26.) The regulations clearly prohibit paying of a salary of any employee of a private school for services rendered during regular duty hours. 45 C.F.R., Sec. 116.19 (e). (Note also the legislative statements quoted *supra*.) Petitioners' erroneous statement is apparently caused by their misunderstanding of USOE Program Guide No. 24, Sec. 9 (reprinted in USOE Handbook, pp. 34 and 35). That Program Guide does *not* deal with the employment of teachers, bur rather with inservice training. That Guide states:

> "Teachers who are regular employees of private schools may receive inservice training under Title I projects only if they are definitely committed to serving educationally deprived children in a Title I project and if the inservice training would assist them in so serving."

Obviously, a teacher employed by a public school district to teach in a Title I program would be entitled to participate in inservice training under Title I. The Program Guide does not deal with the obvious situation but rather with the unclear situation of whether teachers employed by a private school are eligible to participate in Title I inservice training projects. A person unfamiliar with the actual administration of Title I possibly would not see the difference.

Normally, a Title I program available to public school children is comprehensive and includes instructional personnel, supplementary services, equipment, materials, and supplies. However, occasionally the public school district applies for only equipment and materials under Title I

and provides personnel from other sources. For example, the Berkley Public School District operated an activity called "visual and verbal expression" for 30 public school children. The activity was staffed by four part-time teachers but the teachers were not paid by Title I funds. (R. Vol. VII, Defendants' Exhibit No. 10a, unnumbered page 29, offered in evidence R. Vol III, p. 108.) Although this practice is rare in public schools in Missouri because personnel paid out of Title I funds are freely available to public school children, it has been an almost universal practice in regards to educationally deprived children enrolled in private schools since the State prohibited them from receiving the benefits of Title I paid personnel. For example, Defendants' Abstract of the St. Louis Title I project states that educationally deprived children enrolled in nonpublic schools will participate by "considerable use of equipment and materials and remedial programs *staffed and operated by the nonpublic schools* on their premises." (R. Vol. VI, Defendants' Exhibit No. 3, unnumbered p. 3, offered in evidence R. Vol. III, pp. 11 and 78. Emphasis added.) Also note all of the nonpublic school projects described in the Kansas City Title I Application involve only the lending of equipment and materials and are entirely staffed by the contributed services of nonpublic school teachers. (R. Vol. V, Plaintiffs' Exhibit No. 8, offered in evidence R. Vol. III, p. 144.)

It is this type of teachers who are paid by nonpublic schools or other non-Title I sources and contribute their services to Title I projects, to which Program Guide 24, Sec. 9 is addressed. Under no circumstances may Title I funds be used to pay the salary of a nonpublic school teacher. 45 C.F.R., Sec. 116.19(e).

Petitioners' next erroneous assertion is that Title I teacher aides may assist regular nonpublic school teachers. (Petitioners' Brief, page 36.) Even Petitioners admit that

the Program Guide forbids this but contend that the enforcement of the prohibition would require continual policing.

USOE Program Guide 24, Sec. 10 (reprinted in USOE Handbook, p. 36) expressly prohibits the assignment of a teacher aide to provide general assistance to a nonpublic school teacher even if the nonpublic school teacher performs functions with respect to a Title I project. The enforcement of this prohibition requires no policing because the prohibition is not against the activities of the teacher aide, but against the aide being there in the first place. The only time a teacher aide may be made available on private school premises is when the person is an aide to a Title I paid teacher in which case both persons are under the direct control and supervision of the LEA, the public agency.

"No provision of the Act authorizes any grant for providing any service to a private institution. . . ." Senate Report No. 146, 1965 Cong. and Admin. News 1446 at 1456.

(3) Title I limitations to the secular are clearly demarked and enforceable without "excessive entanglement."

In *Nyquist-Sloan-Levitt*, this Court invalidated state statutes because they provided unrestrictive grants to private institutions or affiliated persons. "There has been no endeavor 'to guarantee the separation between secular and religious educational functions to insure that state financial aid supports only the former.'" *Nyquist, supra* at 2970-71 (quoting *Lemon*).

Title I grants funds to public agencies and *only public* agencies for the purpose of providing benefits meeting

the special needs of educationally deprived children in low-income areas wherever such children may be found—in a public school, in a nonpublic school, or out of school. 20 U.S.C., Sec. 241a and Sec. 241e(a)(1) and (2). Control of funds, title to property, and administration of Title I programs is expressly limited to public agencies. 20 U.S.C., Sec. 241e(a)(3)(A). Salaries of nonpublic school teachers are not paid. 45 C.F.R., Sec. 116.19(e). Because the operation of Title I is solely vested in public agencies, restriction to secular functions is inherent. However, even further precautions to restrict Title I solely to secular functions have been taken by the U. S. Commissioner in his regulations and criteria.

Some examples: Construction of private school facilities is prohibited. 45 C.F.R., Sec. 116.19(e); USOE Program Guide No. 24, Sec. 2. (Reprinted USOE Handbook, pp. 29 and 30.) Although equipment may be permanent when used on public school premises, it must be mobile or portable when used on private school premises. 45 C.F.R., Sec. 116.19(e). Although Title I equipment may be used by the public schools for non-Title I purposes so long as the use does not interfere with Title I purpose, equipment made available to private school students may only be used in connection with the approved Title I project. 45 C.F.R., Sec. 116.20(a); USOE Program Guide No. 24, Sec. 5. (Reprinted USOE Handbook, pp. 30 and 31.) Although equipment is retained on public school premises at the end of a Title I project, equipment placed on private school premises must be removed at the end of the project. 45 C.F.R., Sec. 116.20(b). Where equipment is placed on private school premises, a more complete inventory is required to be kept by the public agency. 45 C.F.R., Sec. 116.55. Title I may include a work-study activity, but in the case of children attending private schools, additional

restrictions are imposed. These restrictions are: the work services may not be related to religious instruction or worship; may not enhance the value of the private school premises nor supplement activities normally financed by the private school. USOE Program Guide No. 24, Sec. 1. (Reprinted USOE Handbook, p. 29.) While the teacher aides paid for under Title I may be used to free a regular public school teacher, such aides cannot be used to relieve nonpublic school teachers, even to allow the teacher to perform functions with respect to a proper Title I project. USOE Program Guide No. 24, Sec. 10. (Reprinted USOE Handbook, p. 36.) And, of course, no Title I funds may be used either on public or nonpublic premises for religious worship or instruction. 45 C.F.R., Sec. 116.53(e).

In short, the separation of the secular from the sectarian is clearly identifiable in Title I programs.

In *Lemon-DiCenso-Sanders*, this Court struck down state statutes for the reason that although the legislature had taken precautions to restrict assistance to the secular functions "a comprehensive, discriminating, and continuing state surveillance will inevitably be required to insure that these restrictions are obeyed in the First Amendment otherwise respected." *Lemon, supra* at 619.

Petitioners contend that the assignment of Title I teachers to provide services on private school premises will require this kind of surveillance and thereby violate this Court's "excessive entanglement" test.

First of all, unlike *Lemon-DiCenso-Sanders*, under Title I no funds or property is granted to a private institution or employee thereof. Therefore, no accounting is maintained by a private institution. Simply no occasion exists for governmental examination or audit of the records of private institutions.

In *Lemon-DiCenso-Sanders*, the teachers were the regular employees of the nonpublic school. The power to hire and fire was in nonpublic school officials. The day-to-day supervision and control of these teachers was also in nonpublic school officials. The Court noted that in almost all cases, the teacher was of the same religion as that which sponsored the school. The subjects that the teacher taught were the regular courses of general instruction and selected by the administration of the nonpublic school. Public paid services supplanted part of the regular school curriculum. *None* of these factors exist in regard to Title I personnel.

The Title I teacher, therapist, social worker, etc. who serves educationally deprived children, whether they be enrolled in public or private schools, is the employee of a *public* agency. The public board of education has the power to hire and fire, to supervise and control that employee. For the public board of education to give preference on the basis of religion whether the children served were enrolled in public or private schools would be in violation of the Missouri Constitution, the Missouri Fair Employment Practices Act, and federal laws. Article I, Sec. 5, Missouri Constitution; Sec. 296.020, RSMo. 1969. Services offered to children enrolled in private schools are not part of the regular curriculum of that school, not only is it prohibited to provide services that are normally provided by the private school (45 C.F.R., Sec. 116.19(e)) but further in every case Title I services are directed to meet the special educational needs of the educationally deprived *child* rather than the needs of the student body at large or a specific grade or class. 45 C.F.R., Sec. 116.17(g), and Sec. 116.19(c).

Without realizing it, Petitioners in their brief have expressed the real distinction that exists here. In Petitioners'

words, ". . . the Establishment Clause forbids entanglement of the state with religious institutions; *it does not forbid entanglement with its own institutions.*" (Petitioners' Brief, page 35. Emphasis added.)

If the state were to place government inspectors in every Title I classroom to audit the instruction given therein to assure that no religious inculcation occurs, those inspectors would not be inspecting nonpublic schools or their employees, but the government's *own* employees and services.

Petitioners have asserted that Title I personnel will be recruited by private school authorities and only technically be employed by the LEA. (There is no evidence that such a practice ever has or ever would occur in Missouri.) However, if such a practice did occur, it would be because the LEA failed to carry out its legal responsibilities, in which case the state educational agency or the United States Office of Education can force the LEA's compliance to the law. In such a case, the relationship would be only between public agencies.

To paraphrase this Court's statement in *Allen, supra,* at 245, "Absent evidence we cannot assume that (public) school authorities, who constantly face the same problem in selecting (instructional programs) for use in public schools, are unable to distinguish between secular and religious (instruction) or that they will not honestly discharge their duties under the law."

When Title I personnel provide services on private school premises, most commonly the classroom or other facility is contributed by the private school. Respondents do not believe the minimal arrangements necessary to provide the physical space necessary to conduct the instruction arises to the level of "excessive entanglement." But, if the lack of public dominion over the physical space

presents a problem, it is a simple matter for the public agency to lease the space from the private school and thereby obtain legal control. (For guidelines regarding leasing the private school premises see: USOE Program Guide No. 24, Sec. 7, Reprinted USOE Handbook, pp. 32-34.) This is the type of arrangement that was used with approval in *Nebraska State Board of Education et al.* v. *School District of Hartington, etc.*, 409 U.S. 921. Another option is to provide services to educatiionally deprived children enrolled in private schools by offering them ina self-contained mobile unit that is placed adjacent to the private school premises. USOE Handbook, p. 11.

(4) Title I serves all children and does not create a special beneficiary class based on religion or school attendance.

The common defects in *Lemon-DiCenso-Sanders* and *Levitt-Nyquist-Sloan* is that the legislation created a special beneficiary class. In those cases, "the state has singled out a class of citizens for a special economic benefit." *Sloan*, 93 S.Ct. 2982, 2986. ". . . it should be apparent that in terms of the potential divisiveness of any legislative measure the narrowness of the benefitted class would be an important factor." But contra-wise, the services provided in *Allen* and *Everson* were provided "in common to all students." *Lemon, supra* at 616. And this is true of Title I. Title I does not create a special beneficiary class along religious lines. It clearly provides a program to meet the special needs of educationally deprived children in low-income areas without regard to where or whether they go to school. Title I does not create competition between public and nonpublic schools for public funds, since all children are treated alike, and based solely on their need. In fact, such legislation has created unity among educators and is the antithesis of political divisiveness.

(5) The LaNoue Paper, on which State Board rests its Argument, provides neither evidentiary basis nor legal authority for the position of the State Board of Education.

In its Brief, the State Board cites and quotes extensively from the paper of George LaNoue, Church-State Problems in New Jersey: The Implementation of Title I (ESEA) in Sixty Cities, 22 Rutgers Law Review 219 (1968). This paper purports to analyze the operations of Title I in New Jersey in the early years of Title I.

It is most important to observe that the materials contained in the paper, which are represented as based on investigation, are materials that have no place at all in the record of this lawsuit, because they were never received as evidence in the case. Furthermore, the vast bulk of the materials could never have been admitted as evidence in proceedings, not only because they were highly conjectural and speculative, but because they were based upon the most ephemeral sort of hearsay. Some of the conversations were related third and fourth hand.

LaNoue's own background and predictions scarcely qualify him as an impartial observer. He had long been active in American Civil Liberties Union. (Hearings Before the Subcommittee on Education on H.R. 2361 and 2362, pages 1659, 1670.) The Rutgers study was sponsored by American Jewish Congress and the Civil Liberties Union (22 Rugers L. Rev. 219), both of which oppose the claims of the educationally deprived children in private schools in the case. LaNoue appeared before the Subcommittee to oppose the enactment of 20 U.S.C., 241(a)(2) as it was drawn and submitted to the Congress, and sought to limit the participation of private school children. Hearings, 89th Cong. H.R. 2361, 1670, 1671. Neither of LaNoue's amendments were adopted by the Congress.

While the LaNoue Paper is now characterized as a "careful study of Title I programs" (Pet. Br. 11), the first fifteen pages are merely an argument as to the constitutionality of the participation of private school children in public educational benefits. We have demonstrated that the Congress was painstaking in its effort to provide special educational benefits to the disadvantaged private school child under Title I, and that the Commissioner carefully followed the legislative mandate in formulating Regulations and Guidelines. Similarly, the Congress and the Commissioner displayed great caution in prohibiting direct aid to private schools. Nevertheless, LaNoue continues throughout his paper to refer to Title I as "aid to parochial schools," p. 220, "public aid to parochial schools" p. 223, and questions the integrity and sincerity of the Congress and the Office of Education when the government maintains that the Title I benefits are for the child and not the parochial school, pp. 225, 234. LaNoue finally hoists his true colors and designates the parochial schools as the "real enemy" of groups concerned with public education and the separation of church and state, p. 261.

One of the so-called "findings" of the LaNoue Paper certainly compels a far different conclusion than that postulated by the writer. On page 260, LaNoue takes to task the several attorneys for the New Jersey school districts for not testing the constitutionality of Title I participation by private school children. LaNoue seems to charge them with indifference, incompetence, political pressure or perhaps something to do with the attorney's "life." Really, is it not much more plausible to conclude that the School Board attorneys of New Jersey, like the Congress, like the United States Court of Appeals for the Eighth Circuit, like the Attorney General of Missouri, like the Attorneys of both Department of Justice and H.E.W., have correctly decided and concluded that the

rendering of special educational services to private school children in their schools is constitutional?

LaNoue discovered that the State Attorney General was requested to rule on the constitutionality of providing Title I services on private school premises, and LaNoue emphasizes the importance of a ruling by the Attorney General of the State, pp. 262, 263. Although the Attorney General of New Jersey did not rule, we must observe that the Attorney General of Missouri did issue a clear and formal opinion in which he determined that furnishing Title I services to disadvantaged children on private school premises was not in violation of constitutional principles. (Pet. Writ A 20.)

We submit that the LaNoue Paper is both an improper attempt to inject into evidence facts which are totally inadmissible as evidence and also a citation to an authority which is so partisan and argumentative that it can carry no weight whatsoever.

For all of the reasons stated, Respondents respectfully submit that the providing of special services to educationally deprived children by Title I personnel on private school premises does not offend the Establishment Clause. The historical causes and legislative intent are valid public and secular causes and purposes. No direct cash payment or other assistance is provided to any nonpublic institution or its employee. The services are clearly limited to the secular and enforcement of these limitations involves a relationship between public agencies and public employees and not any "excessive entanglement" with religion. The providing of these services equitably to all children in common based on their needs tends to be unifying rather than divisive.

III

In frustrating the purposes of the act and in denying the benefits of Title I, ESEA, to educationally deprived children in private schools, the State Board of Education, its members and officers, are not protecting any lawful or constitutional interest of theirs and have no standing to contest the constitutionality of Title I, ESEA, and its educational programs: the State Board of Education has not preserved, and does not present, any substantial constitutional issue which is properly before the court for determination.

A. The State Board of Education has no standing to challenge the constitutionality of Title I, ESEA, or of its programs.

The Respondents are the State Board of Education, its members and Commissioners. The actions of these Respondents in the implementation of Title I, ESEA, have had as a purpose the withholding of educational benefits from educationally deprived children in private schools. The necessary effect of these actions of the State Board is that coercion is exerted on private school children and their parents to withdraw from private schools and to enroll in public schools. The United States Court of Appeals clearly spelled out the nature of the inequities and injustices perpetrated on the private school children, *Barrera* v. *Wheeler*, 475 F. 2d 1338, 1344, 1345, 1346, 1347, 1348, 1355, 8th Cir. (1973). (Pet. Writ A1, A10, A12, A13, A15, A16, A29, A30.) Indeed, the State Board of Education does not seriously contend that comparable educational benefits are provided private school children in Missouri, and does not even suggest that these children are provided genuine opportunities to participate in Title I programs. The State Board of Education seeks to justify its untoward posture in the case by charging that Title I, ESEA,

programs which require the public school teacher to render special educational services to educationally deprived children on private school premises are unconstitutional.

The record herein is completely devoid of any suggestion of any sort of right or interest or privilege of the State Board of Education, its members and Commissioners, which is diminished or jeopardized by the operation of Title I, ESEA, as designed by the Congress and regulated by the Department of Health, Education, and Welfare. Such facts distinguish the case from *Board of Education* v. *Allen*, 392 U.S. 236 (1968), where the State officials had the risk of removal from office if they failed to carry out the provisions of the Statute. (The question of standing does not appear to have been squarely before the Court in *Board of Education* v. *Allen, supra,* so that further distinctions cannot be observed.) It must be pointed out further that the New York Court had held that the State Agency did have standing under State law in the *Allen* case.

This Court has relied on the decisions of State law in determining the standing of State officers to test the constitutionality of Statutes and regulations. This was the holding in *Smith* v. *Indiana*, 191 U.S. 138 (1903), where a county officer refused to deduct the amount of a mortgage from the assessed value of property, as a State Statute required, and the county officer charged that the Statute was unconstitutional. The Supreme Court of the United States refused to pass on the constitutionality of the Statute and stated, page 139:

> "It is but just to say, however, that the power of a public officer to question the constitutionality of a statute as an excuse for refusing to enforce it has often been assumed, and sometimes directly decided, to exist. In any event, it is a purely local

question, and seems to have been so treated by this court in Huntington v. Worthen, 120 U.S. 97. . . . It is evident that the auditor had no personal interest in the litigation. He had certain duties as a public officer to perform. The performance of those duties was of no personal benefit to him. Their nonperformance was equally so. He neither gained nor lost anything by invoking the advice of the supreme court as to the proper action he should take. He was testing the constitutionality of the law purely in the interest of third persons, viz, the taxpayers, and in this particular the case is analogous to that of Caffrey v. Oklahoma. . . . We think the interest of an appellant in this court should be a personal, and not an official, interest, and that the defendant, having sought the advice of the courts of his own state in his official capacity, should be content to abide by their decision."

This Court took the same view in the later case of *Stewart* v. *Kansas City*, 239 U.S. 14 (1915). There a County Treasurer challenged the constitutionality of a State Statute, and it was stated, page 16:

"Plaintiff in error is not impleaded as a taxpayer nor does he defend as such. He is sued as a county officer and defends by virtue of the exercise of his functions as a county officer. In other words, he defends by virtue of laws of which he is an instrument. Constituted by the laws of the state, he yet attempts to resist one of its laws. Whether he may do so is purely a local question."

There is no doubt that Missouri law clearly provides that State ministerial officials have no standing to test the constitutionality of ordinances under which they perform their duties. The Supreme Court of Missouri has

held that such is the law. *State of Missouri ex rel. St. Louis County* v. *Kelly*, (Mo. S.Ct.) 377 S.W. 2d 328 (1964).

There is a clear and compelling logic to the rule that state agencies and officers, acting in their official capacity only, may not challenge the laws and rules under which they operate. The sense of this rule is highlighted by the facts of this case. Here the United States distributes at least $23,000,000.00 to the State of Missouri annually (Record Vol. III-164), and requires that it be used for the purposes set forth in the Statute and that the State Board of Education provide assurances as to the use of these funds. 45 C.F.R., Section 116.19, Section 116.31. The State Board of Education has accepted the "annual largesse from Washington," as the District Court termed the Title I grant, (Pet. Writ A44), and simply proceeded to implement the Act as it wished. Over the years it has expended over $190,000,000.00 in Title I funds, and has interpreted its duties according to its own whims and prejudices. It should not be permitted now to challenge the constitutionality of the Federal Statute or the operation thereof.

This Court has traditionally held that state officers could not contest the constitutionality of the Statutes under which they perform their duties. In *Columbus and Greenville Railway Company* v. *Miller*, 283 U.S. 96, (1931) this Court considered the question of the standing of the state officer to complain of a constitutional question. In resolving the issue against the state officer, the Court stated, l.c. 99:

> ". . . While so far as state practice is concerned, the authority of a public officer to assail in the courts of the state the constitutional validity of a state statute is a local question, this fact does not alter the fundamental principle, governing the determination of the Federal question by this court, that the protec-

tion of the 14th Amendment against state action is only for the benefit of those who are injured through the invasion of personal or property rights or through the discrimination which the Amendment forbids. The constitutional guaranty does not extend to the mere interest of an official, as such, who has not been deprived of his property without due process of law or denied the equal protection of the laws."

Consistent with the traditional holdings on this point, in *Tennessee Power Electric Company* v. *Tennessee Valley Authority*, 306 U.S. 118 (1939), the complainants contended that the statutory plan for the Tennessee Valley Authority Act was unconstitutional, and they further contended that their rights would be violated by the Tennessee Valley Authority acting pursuant to the Statute. The Court held that any infringement or injury was too contingent and remote to give standing to attack the constitutionality of this Statute, stating, l.c. 137:

"The appellants invoke the doctrine that one threatened with direct and special injury by the act of an agent of the government which, but for statutory authority for its performance, would be in violation of his legal rights, may challenge the validity of the statute in the suit against the agent. The principle is without application unless the right invaded is a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on the statute which confers a privilege."

The rule should be even more strictly defined in this matter where the State agency and State officers are challenging a Statute of the United States under which they not only have sustained no damage but in fact have reaped substantial benefits.

Of necessity the question forces itself upon us: What is the position and purpose of the State Board of Education in this matter? If the State Board of Education properly implements Title I, ESEA, and provides lawful benefits to private school children, it sustains no damage; the State Board simply complies with the requirements of the Statute. The only consistency in the position of the State Board lies in its grim determination to deprive private school children of the educational benefits provided for them in Title I, ESEA. This unyielding reluctance to comply with the terms of the Statute does not justify an attack on such meritorious and successful programs as those provided by the Congress in the Elementary and Secondary Education Act.

B. There does not exist a justiciable controversy on any constitutional issue which is now ripe for determination.

In its Petition for a Writ of Certiorari the State Board raised the question of the Establishment Clause as it may affect the requirement that Title I teachers render educational services on private school premises. (Pet. Writ 2.) The State Board now presents that issue in its Brief (Pet. Br. 26), and seeks to develop the issue by imaginative and conjectural observations as to the most remote possibilities which could occur. (Pet. Br. 33-42.) The only authority cited for these hypothetical occurrences is the rather suspect polemic of George R. LaNoue, 22 Rutgers Law Review 219 (1968).

We submit that the Establishment Clause is not a proper issue in this case, and that there is no such issue ripe for determination by this Court.

First let us review the Record. In its rather lengthy Answer (App. 20), the State Board asserted many de-

fenses, all of which were properly held to be unsupported by evidence or in law. Paragraph 22 (App. 33) pleads that the Constitution, laws and public policy *of the State of Missouri* forbid assignment of public school teachers to private schools. This paragraph follows the theme of the Answer, as well as the position of the State Board throughout the case,—that the laws of the State of Missouri properly override the Federal Act. Paragraph 23 of the Answer refers to a constitutional construction of the Statute, but does not plead the United States Constitution or any Article or Section thereof. *Throughout the Answer of the State Board, no reference is made to the First Amendment of the Constitution of the United States.*

It came as no surprise that the District Judge, even in finding for the State Board of Education, was compelled to observe (Pet. Writ A 44) that:

> "The defendants, who undoubtedly welcome this twenty-five to thirty million dollar annual largesse from Washington, have carefully skirted the question by simply stating that they do not question the constitutionality of Title I as interpreted by defendants. . . ."

Thus, there was really no genuine issue of the Establishment Clause presented in the District Court.

The Court of Appeals opinion consisted of an exhaustive and definitive review of Title I, ESEA, and of the facts of the case. The position of the State Board that the Title I funds could be used by the State Board as state funds was rejected. (Pet. Writ A 24.) The Court of Appeals explained that the Statute and the Regulations had a clear and unequivocal meaning and purpose, and that educationally deprived children in Missouri could no longer be discriminated against and deprived of the special educational benefits simply because they did not attend public schools. The Court observed that Title I author-

izes special educational services, as distinguished from general educational aid, to be rendered on private school premises. *Barrera* v. *Wheeler*, 475 F. 2d 1338, 1353, 8th Cir. (1973). (Pet. Writ A 24, A 25.) The Court's opinion was that where special services were rendered public school children, comparable services must be provided the disadvantaged private school child, p. 1353. (Pet. Writ A 25.)

The Court of Appeals held that there was no definite or particular program or service presented to the Court for review or decision. The abstract and hypothetical situations now suggested by the State Board of Education —making public school teachers wear hats in Jewish schools, the attendance of Title I public school teachers in religious schools on religious holy days (Pet. Br. 39), the religious proclivity (or lack of it) of the public school Title I teacher—surely do not present substantial constitutional questions. The Court of Appeals properly declined to conjecture on such speculative circumstances, and proceeded to rule on the basis that the law was clear and that the evidence clearly established the refusal of the State Board of Education to recognize the lawful interests of the educationally deprived and culturally disadvantaged children in private schools. (Pet. Writ A 15, A 15 note 13.) This finding and determination was based upon testimony, evidence, and fact, not upon surmise, conjecture and supposition. The decision required the State Board of Education to comply with the directions of the Congress, and pointed out that when the special needs of educationally deprived children require it, special teaching services shall be furnished on private school premises.

The State Board of Education continues and persists in its efforts to deny private school children the benefits of the Statute. That position prompts the resort to the

charge that the implementation of Title I in Missouri violates the Establishment Clause, and the State Board seeks a decision on the hypotheses which it poses. These present no constitutional issue. This Court, in *United Public Workers* v. *Mitchell*, 330 U.S. 75, 89 (1947), stated:

> "The power of courts, and ultimately of this Court, to pass upon the constitutionality of acts of Congress arises only when the interests of litigants require the use of this judicial authority for their protection against actual interference. A hypothetical threat is not enough. We can only speculate as to the kinds of political activity the appellants desire to engage in or as to the contents of their proposed public statements or the circumstances of their publication. It would not accord with judicial responsibility to adjudge, in a matter involving constitutionality, between the freedom of the individual and the requirements of public order except when definite rights appear upon the one side and definite prejudicial interferences upon the other."

More recently, in *United States* v. *Raines*, 362 U.S. 17, 21, this Court stated:

> "Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional. . . . Citing cases. . . . In Barrows v. Jackson, 346 U.S. 249, 97 L.Ed. 1586, 73 S. Ct. 1031, this Court developed various reasons for this rule. Very significant is the incontrovertible proposition that it 'would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and

comprehensive legislation.' *Id. 346 U.S. at 256. The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined. . . ."

The constitutional question upon which the State Board now seeks to use to excuse its flagrant violation of the Statute is not "presented in the context of a specific live grievance." *Golden* v. *Zwickler*, 394 U.S. 103, 110 (1969). The State Board of Education is not entitled to be relieved of their wrongdoing by raising the issue of the Establishment Clause at this time.

CONCLUSION

For the foregoing reasons, Respondents pray that the Writ be dismissed or in the alternative that the decision of the Eighth Circuit Court of Appeals be affirmed.

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APPENDIX

USOE SURVEY OF TITLE I PROGRAMS

The responses on the following pages were given in answer to five questions directed to each State Educational Agency in reference to Title I of the Elementary and Secondary Education Act. The questions are as follows:

1. Do State statutes permit (i.e. not forbid) private school children to participate in dual enrollment or shared time programs during the regular school day?
2. Is dual enrollment used as a matter of practice in Title I programs in your State?
3. Do State statutes permit (i.e. not forbid) Title I instructional services to be provided on the premises of private schools during regular school hours?
4. In practice, are Title I instructional services provided on the premises of private schools during regular school hours?
5. What other means do you use to provide Title I services to private school children during the regular school day?

This information represents a telephone survey of State Educational Agency program officials as they understand the operation of their state's law and the Title I programs in their state. No further attempt was made by the United States Office of Education officials to verify the accuracy of this information.

State	Question No. 1	Question No. 2	Question No. 3	Question No. 4	Question No. 5
Alabama	Yes	No	Yes	Yes	Supplies and materials—Inservice training—Supportive services
Alaska	Yes	No	Yes	Yes	None
Arizona	Yes	Yes	Yes	Yes	Portable facilities—Materials and equipment—Testing and counseling—Aides
Arkansas	Yes	Yes	Yes	Yes	Supportive services
California	Yes	Yes	Yes	Yes	Yes—rented neutral space and portable facilities
Colorado	No	No	Yes	Yes	Portable facilities—Aides—Testing and Counseling—Materials and equipment
Connecticut	Yes	Yes	Yes	Yes	None
Delaware	Yes	No	Yes	Yes	Materials and equipment
Florida	Yes	Yes	Yes	Yes	Materials and equipment—tutorial services—supportive services—transport children to public schools for Title I services
Georgia	Yes	Yes	Yes	Yes	None
Hawaii	Yes	Yes limited	Yes	No	None
Idaho	Yes	No	Yes	Yes	Materials and equipment—testing and counseling
Illinois	Yes	Yes	No	No	None
Indiana	No	No	Yes	Yes	None
Iowa	Yes	Yes	Yes	Yes	Materials and equipment
Kansas	Yes	Yes	Yes	Yes	Materials and equipment
Kentucky	Yes	Yes	Yes	Yes	None
Louisiana	Yes	Yes	Yes	Yes	Inservice training—supportive services
Maine	Yes	Infrequent	Yes	Yes	None
Maryland	Yes	No	Yes	Yes	None
Massachusetts	Yes	Yes limited	Yes	Yes	Shared facilities
Michigan	Yes	Yes	Yes	Yes	Shared field trips
Minnesota	Yes	Yes	Yes	Yes	None
Mississippi	Yes	Yes	Yes	Yes	None
Missouri	No	No	No	No	Inservice training—materials and equipment
Montana	Yes	Yes	Yes	Yes	Rented neutral space
Nebraska	Yes	Yes	Yes	Yes	None

Nevada	Yes	No	Yes	Yes	None
New Hampshire	Yes	Yes	Yes	Yes	None
New Jersey	Yes	Yes	Yes	Yes	None
New Mexico	Yes	Yes	Yes	Yes	Inservice training
New York	No	No	Yes	Yes	None
North Carolina	Yes	Yes	Yes	Yes	Tutorial services
North Dakota	Yes	No	Yes	Yes	None
Ohio	Yes	Yes	Yes	Yes	District co-ops
Oklahoma	Yes	Yes	No	No	Medical and dental services—testing and counseling
Oregon	Yes	No	Yes	Yes	None
Pennsylvania	Yes	Yes (uncommon)	Yes	Yes	None
Rhode Island	Yes	Yes	Yes	Yes	None
South Carolina	No	No	Yes	Yes	Inservice training
South Dakota	Yes	Yes	Yes in leased space	Yes	Rented or leased neutral space—materials and equipment
Tennessee	Yes	No	Yes	Yes	Tutorial services—counseling services
Texas	Yes	Yes	Yes	Yes	None
Utah	Yes	Yes	Yes	Yes limited	Materials and equipment
Vermont	Yes	No	Yes	Yes	None
Virginia	No	No	Yes limited	Yes limited	None
Washington	Yes	Yes	Yes	Yes	None
West Virginia	Yes	No	Yes	Yes	None
Wisconsin	Yes	Yes	Yes in leased space	Yes	None
Wyoming	Yes	No	Yes	Yes	Aides